2002

CASES

ARGUED and DECREED

IN THE

High Court of Chancery.

——————Ut dicere læſo
Jus populo poſſint, Injuſtitiæque mederi.

The Third Edition, carefully corrected from the Errors of former Impreſſions.

To which are now added

Proper NOTES and REFERENCES to the Ancient and Modern BOOKS of *Law* and *Equity*; with many New Caſes, Maxims and Rules, neceſſary for Illuſtrating and Explaining the Whole.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for **J. Walthoe**, Sen. and are to be ſold by **T. Osborne** in *Grays-Inn*. M DCC XXXV.

CASES

ARGUED AND DECIDED

TO THE

READER.

PIECES of this Nature, how indifferent ſoever, have never yet miſſed a favourable Acceptance: The very Want and Matter of them made them Welcome to the World, in Spight of all the Diſadvantages of a *Blunder'd Compoſition*, infinitely below the Dignity of *Chancery*, and ſhort of that Excellent Language and Reaſon with which Caſes are daily debated and decreed there. It is, doubtleſs, for the Honour of this Noble Court, its Proceedings ſhould be known, as well as the Intereſt of Mankind to be inſtructed how they may be relieved againſt the *Trepans* of *Deceit* and *Fraud* in this *Great Sanctuary* of *Plaindealing* and *Honeſty*.

To the READER.

This, I hope, will make the *Uſefulneſs* of the preſent *Publication* unqueſtionable, which is here offered to the World without *Encomiums* and *Flouriſhes* from the *Approbation* of *Great Men*, or *Compariſon* with meaner Books of this Kind. If it be really the *beſt Undertaking* of this Nature yet extant, the *Reader* will eaſily diſcern it; and 'tis more reaſonable he ſhould take the Character from the *Book* it ſelf, than from the *Preface*.

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DE
Term. Sanct Trin.
Anno Regis 12 Car. II,
IN
CANCELLARIA.

Chief Juſtice Foſter *in Abſence of the Chancellor.*

Copleſton *againſt* Boxwill.

THE Plaintiff made an abſolute Conveyance in Fee to the Defendant, by Leaſe and Releaſe, of Lands worth 1000 l. per Ann. in Conſideration of 1000 l. The Plaintiff at the making the Conveyance had but the Reverſion in Fee expectant on an old Life, which ſhortly after died; the Plaintiff then made Livery to the Defendant. The Bill was, That the ſaid Conveyance was a Mortgage, and that he might be admitted to redeem. The Proof was, That the Defendant had ſaid ſeveral Times after the Conveyance, That he knew not how long he ſhould enjoy the ſaid Lands; and had ſaid alſo,

An abſolute Conveyance not redeemable, &c.
1 *Vern.* 8. 268, 269.
Ibid. 168, 169.
See 2 *Vern.* 84, 288.
1 *Chan. Rep.* 222, 3.
Poſt. 285, 286.

also, That he would take his Money again with Damages. This was strongly urged by the Plaintiff's Counsel to be a Mortgage.

Remedy for the Mortgagor and Mortgagee ought to be reciprocal.
1 *Vern.* 7, 8, 192, 215, 268.
1 *Chan. Rep.* 122, 123.
2 *Chan. Rep.* 247.

Churchil of the Defendant's Counsel insisted, That it is a Maxim, That none can come to redeem a Mortgage when the Mortgagee cannot compel the Payment of the Mortgage-Money; for the Remedy ought to be reciprocal: And in this Case the Defendant hath no Remedy to inforce the Payment of this Money. And moreover he insisted, That if it were a Mortgage, it must be so a principio, either by a Condition in the Deed it self, or by another Collateral Deed made at the same Time; for the Condition ought to be made and conceived at the same Time with the Conveyance. And in the principal Case it was not said that it was a Mortgage at first, but by Agreement subsequent; and then he said, that was a nude Agreement, and no manner of Execution of it.

A Paroll Agreement after Conveyance, cannot make it a Mortgage, if not so at first.
See 2 *Chan. c.* 136, 143.
2 *Chan. Rep.* 78.

The Matter by Consent was referred to be determined in an amicable Way.

Note, 'Tis a general Rule that a *nude* or naked Agreement, *i. e.* without Consideration, is not good in Law or Equity; *contra*, if the Consideration be only unequal. *Post.* 42.

The Lord Chancellor.
Chief Justice Foster.

Katharine Venables *against* Foyle.

Rep. Chan. Part 1. 178.
Assignment of a Mortgage, the Mortgagee ordered to account before Assignment, and after it.
1 *Vern.* 258, 267, 270.

KAtharine Venables being a Tenant to Winchester-College of the Rectory of Andover, and indebted 700 l. to the Defendant, agreed with him, that he should pay 400 l. to the College for her, and that he should surrender her Lease, and take a new one in his Name; and it was also agreed, that she should for the first Year of the new Lease hold the Premisses, and pay the College their Rent; and if she did at the first Year's end pay the Defendant his 1100 l. with Damages, the Defendant should assign to the Plaintiff. The first Year effluxeth, and the Plaintiff neither paid the Defendant his Money, nor the College their Rent; and at three Years end she permitted the Defendant to enter upon the Premisses, and to enjoy them. Thereupon the Defendant exhibited a Bill to have the Plaintiff (then Defendant) redeem, or be foreclosed of

Redemption. She answered; and her Intent thereby appeared to be, that the Plaintiff should satisfie himself by Receipt of the Profits, and not to pay him. Hereupon the then Plaintiff (now Defendant) assigned the said Lease to Nicholas Venables, the Plaintiff Katharine her Son, in consideration of an Account made up between them two of what was really due to the Defendant on the Mortgage. This Assignment recited the said Suit by Foyle to have Katharine redeem, and that his Interest was a Mortgage forfeited, and Nicholas Venables covenanted to indempnifie Foyle against Katharine. This being the Case, Katharine exhibited her Bill for to be relieved against Nicholas Venables and Foyle, setting forth the Estate to Foyle to be (as it was) a Mortgage, and sought to be admitted to the Redemption against them both. Nicholas Venables pleaded several Outlawries against her, so that she could not proceed against him. Foyle he answer'd fairly, That he had assigned to Nicholas Venables upon his paying him what was due, and not more. This Case proceeded to an hearing against Foyle only, and in verity the Case was no more, but that a Mortgagee assigns his Mortgage over for his due Debt. But it was much insisted by the Plaintiffs Counsel, That there was a Breach of Trust in Foyle; and it was decreed that Foyle should account for all the Profits both before and after the Assignment, and pay the Overplus above his own Debt with Damages to the Plaintiff, and convey, and procure all claiming under him to convey to the Plaintiff, free from Incumbrances done by him and them. Afterwards Foyle not being able to perform this Decree, exhibited a Bill against Katharine and Nicholas Venables, setting forth a Fraud and Practice between them, and that he was willing to account unto the Time of his Assignment, and to comply with the Decree as far as he was able, and prayed Nicholas Venables might come to an Account from the Time of the Assignment and Recovery. Nicholas Venables exhibited a Bill against his Mother, claiming the Original Lease by a Title paramount hers; and at the hearing the said Causes about a Year and Half after, it appeared that Nicholas Venables had a Title to the Lease paramount his Mother; and Foyle was, upon hearing the Matter, discharged of the Decree against him.

Outlawry pleaded. 1 *Vern.* 185. 2 *Vern.* 37, 198. *Post.* 258.

A Mortgagee after Forfeiture assigns, and is decreed to account for the whole Time, without the Assignee's being a Party. 1 *Vern.* 168, 194.

A Bill to inforce the doing an Act which the Plaintiff was formerly decreed to procure. Decree impossible, *Post.* 87.

Decree avoided by Original Bill.

1 *Rolls Abridgm.* 382. *Z. pl.* 1. *Post.* 42. 43, 44, *&c.* and 61. 63, *&c.* *Savil* vers. *Darcey.*

For Equity will take all proper Methods to redress or prevent a Mischief, and therefore on the appearing of this new Matter, 'twas very just to discharge *Foyle* from the former Decree. And for the same Reason it is that Bills of Enterpleader and Suits *quia timet* are allowed. *Vide* 1 *Vern.* 190. *Post.* 223.

DE
Term. Sanct. Hill.

Anno Regis 13 & 14 Car. II.

IN
CANCELLARIA.

The Lord Chancellor.
Foſter *Chief Juſtice.*
Windham *Juſtice.*
Hales *Chief Baron.*

Henry Goring, *Bart. and others, Plaintiffs, againſt* Charles Bickerſtaff *and* Elizabeth *his Wife,* John Everfield *by his Guardian Dame* Anne *Alford, Widow, and* John Alford *by Dame* Anne *his Mother and Guardian, Defendants.* Jan. 30.

Upon an Appeal, from a Decree made by the Maſter of the Rolls, by the Defendant Dame *Anne* only.

Settlement of a Term to Uſes, with Power to make Leaſes, *&c.*
Vide Poſt. 9, 131, 132, *&c.*

JOHN Alford, deceaſed, being ſeized of the Manor of Hams, &c. by Indenture dated 1 April, 14 Car. 1. and Fine thereupon, ſettles the ſame to the Uſe of himſelf for Life, the Remainder, as to part, to the Uſe of Frances his Wife for Life, for her Joynture, Remainder to his firſt, and to his fourth Son in Tail, Remainder to Sir Edw. Alford his Brother for Life, Remainder to Sir Edward, and to his firſt and

all other his Sons, Reverſion to his own right Heirs, under a Proviſo, that it ſhould be lawful for the ſaid John and Sir Edward, when they ſhould be ſolely ſeized of the Premiſſes, or any Part thereof, by Virtue of any of the Limitations, at their Pleaſures to make Leaſes of the ſame, or any Part thereof, for one and twenty Years, under what Rent they pleaſed. 7 Julii, 1643. John Alford made his Will, and thereby gave his Daughter Jane (the Defendant Everfield's Mother) 600 l. To his Daughter Elizabeth (now Wife of the Defendant Bickerſtaff) 500 l. to make her Portion 3000 l. and deviſed to her all his Meſſuages in White-Fryars in London, Pickhatch and Goſwell-ſtreet in Middleſex, and in Wigonholt in Suſſex, to her and to the Heirs of her Body, the Reverſion to Sir Edw. Alford and his Heirs; provided that if Sir Edward paid Elizabeth 2500 l. at her Marriage, or at 21 Years of Age, which of them ſhould firſt happen, the Eſtate to her to ceaſe, and the Premiſſes to remain to Sir Edward and his Heirs; and of his ſaid Will made Frances his own Wife Executrix; and afterwards, purſuant to his Power by the Indenture of 1 April, 14 Car. I. he by Indenture of the firſt of January, 1648. did demiſe to the Plaintiffs the greateſt Part of the Manor of Hams, &c. from Michaelmas then laſt paſt, for one and twenty Years, under 10s. yearly Rent, upon Truſt, that they ſhould permit the ſaid John Alford, during his Life, to take and receive the Rents, Iſſues, &c. of the ſaid Manor; and upon further Truſt, that after his Death, Frances his Wife, ſhould receive the Rents, Profits, &c. in Satisfaction of her Joynture, ſo far as the Premiſſes by any former Aſſurance were liable thereunto; and to permit her, during her Life, if the Term ſo long continued, to receive out of the Reſidue of the Rents of the Premiſſes 120 l. per annum, and certain Fire-wood and Faggots; and that the Plaintiffs ſhould pay the ſaid Jane Everfield 50 l. per annum, during the Life of her Huſband; and ſhould permit the ſaid Frances his Wife, during her Life, if the Term ſo long continued, to receive the Reſidue of the Rents, during the Reſidue of the Term of one and twenty Years, if ſhe ſhould ſo long live, to the Intent ſhe ſhould pay thereout ſo much Money towards the Legacies of his Will, as his Perſonal Eſtate ſhould be wanting to pay, and to pay the Reſidue to ſuch Perſon as the ſaid John Alford ſhould by his Will appoint; and for want of ſuch Nomination, to receive the ſame to her own Uſe. And upon further Truſt, that the Plaintiffs after the

Deviſe to be void on Contingency.

Power executed with Truſts, &c.

And Reference to a future Will.

And Deed.

the Death of Frances, during the Reſidue of the Term of one and twenty Years, ſhould permit ſuch Perſon and Perſons as the ſaid John Alford by any Writing by him ſigned and ſealed in the Preſence of two credible Witneſſes, or his laſt Will, ſhould nominate; and for want of ſuch Nomination, or after the Death of the Nominee, the Heir of the ſaid John Alford to take and receive all and ſingular the Rents of the Premiſſes: The ſaid John Alford, by Deed the ſame firſt of January, 1648. ſigned and ſealed in the Preſence of four credible Witneſſes, thereby reciting the ſaid Demiſe and Truſt, did nominate and appoint the eldeſt Son of William Alford, his Brother, to have out of the Reſidue of the Premiſſes 50l. per annum, during the ſaid Term, and his two younger Sons 60l. apiece, and the ſaid Sir Edward Alford to receive the Reſidue of the Rents and Profits, by the Truſt of the ſaid Demiſe limited to be paid to the ſaid Frances, and after her Death to take and receive the Reſidue of the Rents and Profits, during the Reſidue of the ſaid Term, to his own Uſe. It appeared by one Witneſs, that John Alford, three or four Days before his Death, (which was before the Truſt, and the Declaration of Truſt,) did acquaint that Witneſs that he had ſettled the Eſtate in Hams well, as he thought he could, and that his Brother Sir Edward Alford was by an Agreement between them to have all his Eſtate there after his Death, and that he thereout appointed ſome Allowance to his Daughter Everfield, and declared that his Daughter Elizabeth (now Wife of the Defendant Bickerſtaff) was not to have any thing out of his Eſtate there, for that he had otherwiſe provided for her. John Alford, the Night or the ſame Day the Demiſe and Declaration bore Date, died without Iſſue male, leaving the Daughters his Heirs. Sir Edward Alford died inteſtate September 1653. The Defendant Dame Anne, his Relict, had taken out Adminiſtration; Jane, the Mother of the Defendant John Everfield, and whoſe Heir he was, died in the Life of Frances her Mother; Frances having proved John Alford her Husband's Will, died in 1659. having made the Defendant, Elizabeth Bickerſtaff, Executrix. The Defendant Dame Anne, as Adminiſtratrix of Sir Edward Alford, Defendant; John Alford, as firſt Son and Heir of Sir Edward Alford, Defendant; Bickerſtaff and his Wife, in her Right, ſhe being one of the Coheirs of John Alford, and Executrix of Frances who was the Executrix of John Alford; and John Everfield, as Heir to

The Deed of Declaration and Appointment.

Death of the Deviſor, &c.

to Jane, Co-heir with Elizabeth Bickerſtaff, claimed the Benefit of the Truſt, during the Reſidue of the one and twenty Years after Frances her Death; ſo the Plaintiffs being Truſtees, ut ſupra, the Defendants all claiming the Benefit of the Truſt under ſeveral Titles, the Bill was to have the Defendants enterplead, and to deſire the Direction of the Court, to whom the Truſt belonged.

Bill of Enterpleader. *Vide Curſ. Canc.* 458.

Upon the firſt Hearing by the Maſter of the Rolls, 2 November, 13 Car. 2.

The Decree.

Inaſmuch as the Power reſerved to John Alford by the Leaſe is, That after the Death of Frances, the Truſtees ſhould permit and ſuffer ſuch Perſon and Perſons as he ſhould nominate, and after the Death of the Nominee, his own right Heirs to receive the Profits, &c. The Court was of Opinion, That John Alford had no Power to nominate any Perſon to receive the Rents, &c. but during the Life of the Nominee, and no longer; for after the Nominee's Death, the Heirs at Law are nominated by the Original Deed to receive, &c. And when after by Deed Poll Sir Edward Alford is appointed to receive the Rents, that muſt be intended if he ſo long liveth; for the Deed Poll reciteth the Leaſe, and is in Purſuance of the Truſt therein; and that John Alford his Intention in the Original Leaſe was plain; That after the Death of the Nominee, his own Heirs ſhould have the Reſidue of the Truſt; and both the Deeds being executed at one Time, are to be taken as one Aſſurance; and if he had meant the Heirs, Executors or Adminiſtrators of Sir Edward ſhould have the remaining Part after Sir Edward, he would have named them as well as Sir Edward; and for that the Intereſt of the Term was always in the Plaintiff, and never any real or legal Intereſt in Sir Edward, but as Nominee to receive the Profits, he being dead, the Truſt to him ceaſeth, and nothing paſſeth to his Heirs or Executors, but remaineth to Elizabeth the ſurviving Daughter, Heir and Executrix to John Alford; and the Teſtimony of that one Witneſs can be intended to relate to no other Settlement but the firſt by Deed and Fine, and not the Truſt of the Leaſe, which was not in being when the ſaid John Alford had the Diſcourſe with that Witneſs, but was made the Day of his Death; and that the Reſidue of the Term of one and twenty Years doth belong to the Heir at Law of John Alford, who in a doubtful Caſe ought to be preferred, eſpecially when it is ſo conſonant to John Alford's In-

Two Deeds of the ſame Date touching one Thing but one Aſſurance. See the Duke of *Norfolk*'s Caſe.

Heir at Law to be preferred in a doubtful Caſe. See 3 *Chan. Ca.* 131. 2 *Chan. Ca.* 59, 69. 1 *Vern.* 480. and *prox. pag.*

Max. Eq. 11, and 41.
Poſt. 295.
2 *Chan. Ca.* 4, and 117.
1 *Vern.* 219, 480.
2 *Vent.* 363.

Intention, and the Defendant Bickerſtaff is alſo his Executrix and Daughter, and doth therefore order and decree the ſame accordingly, and that the Rents arrear and for the future be paid to the Defendant Bickerſtaff, during the Coverture between them, and after to the Defendant Elizabeth Bickerſtaff, during the Reſidue of the Term.

And Appeal.

And upon the Appeal, the Queſtion was upon the whole Caſe, Whether John Alford had Power to diſpoſe of the Truſt of the whole Term of one and twenty Years after the Death of Frances, and how far he had Power to diſpoſe of it; and whether there were not a Reſtriction by the Limitation of the firſt Deed to the Heirs, after the Death of the Nominee, that did diſable his Diſpoſition thereof farther, except to his Heirs; and whether John Alford had diſpoſed the whole Term or not; and which of the Parties ought to have the Remainder of the Truſt?

The Counſel of the Defendant Bickerſtaff now offered farther, That John Alford had no Power, after two diſtinct Limitations to two ſeveral Perſons, to limit it to a Third after the Death of the Second, becauſe it would make an Executory Deviſe upon an Executory Deviſe to tend to the entailing of a Chattel, and creating a Perpetuity; and that the Limitation of John Alford was out of the Power and Truſt, and not of any Intereſt in the Remainder of the Term. They did all agree in one uniform Opinion, That the Limitation of a Term to ſeveral Perſons in Remainder one after another, if thoſe Perſons were in Being, and particularly named, could in no wiſe tend to the Entail of a Chattel, or Creation of a Perpetuity; but limiting of it to a Perſon not in Being, did: And that where any Perſon had the Truſt of a Poſſibility in Remainder of a Term, he had good Power to declare and make a Diſpoſition of the Truſt of ſuch Poſſibility; but that the Limitation of ſuch Remainder in Poſſibility of a Chattel Real to the Heir of the Perſon limiting, was a void Limitation, and the Eſtate in Intereſt did again revert to John Alford, who made that Limitation; and he having by the Deed Poll the ſame Day of the Leaſe, which was made purſuant to the Power of the firſt Settlement, limited to Sir Edward Alford the whole remaining Term after the Death of Frances, without any other Limitation or Reſtriction, which he might eaſily have done (if ſo intended) the ſame was a good Limitation of it to Sir Edward, his Executors and Adminiſtrators; and if the Power in John Alford had been de-

Executory Deviſe.

Perpetuity.
See the Duke of *Norfolk*'s Caſe in 3 *Chan. Caſes*, and *Poſt.* 33, 131, 132, 230, 213, *&c.*
Limitation in Remainder to ſeveral Perſons in Being, doth not tend to the Creation of a Perpetuity; but otherwiſe if it be to a Perſon not in Being.

The Truſt of a Poſſibility is aſſignable or declarable.

On a void Limitation, the Eſtate reverts to the Limitor.

Limitation of the Truſt of a Term to one, good to his Executors.

feaſible,

fective, his Interest ought to come in aid, and supply it, to make good such Limitation, for otherwise there would be no Disposition at all of the remaining Term, and the Legacies of 50 and 60 l. to William Alford's Children would be avoided, and the Interest in the remaining Term might be pretended to be in the Trustees, and they claim the Estate discharged of the Trust, there being nothing to oppose the Power or Intention of John Alford in limiting the whole Remainder of the Term to Sir Edward, but the implicated, misplaced, and mistaken Expression of the Lease. The whole Court was clear of Opinion, That the former Decree was grounded upon a mistaken Foundation; and that taking both Deeds together, no other equitable or reasonable Interpretation can be made thereof, but that according to the Power, Interest and Intention of John Alford, who it appears by one Witness never intended the Estate to whom it was decreed by the former Decree, the whole remaining Term in the said Lease, and Trust therein after the Death of Frances, for the Residue was well limited and appointed to Sir Edward Alford, his Executors and Administrators; and that the Defendant Dame Anne is well entitled thereunto: And doth order and decree, That the former Order and Decree be discharged; and that the Plaintiffs shall come to an Account for, and pay the said Dame Anne the Rents and Profits of the said Manor, which are in arrear and to grow due until the Expiration of the Remainder of the said Term of one and twenty Years, and convey to her for the Residue of the Term, if so required; and in so doing shall be protected and saved harmless by the Authority of this Court. Vide Moor's Rep. 809. Totton *contra* Mollineaux. 1 Co. Rep. 156. 3 Cro. 577. 10 Co. 47, 48, 52. And quære, Why the Trust of a Possibility in the Remainder of a Term is disposable over, and the Possibility in Interest in the Reversion of a Term is not assignable. Vide 8 Co. Rep. 96. Mat. Manning's Case.

The Interest of the Limitor is to supply his Power if that be defective.

Of Powers defective, &c. *Vide prox. pag.* &c. there cited.

And 2 *Vern.* 80, 376, 379, 528, 521, 542, 665.

A former mistaken Decree discharg'd, *Vide ante* 3.

Note; *Pollexfen* in his Argument of the Duke of *Norfolk*'s Case, said, That if *Mat. Manning*'s Case were again to be adjudged, it would never have the same Judgment; the Suits and Questions introduced by it have been so many, chargeable and difficult, that it was an unhappy Case or Precedent; and it has been frequently said, shall not be enlarged or favoured; and argued that the ancient Rules and Land-marks of the Law ought to be restored. But see all this and much more well and learnedly answered by Lord Chancellor *Nottingham*, in his Argument of the Duke of *Norfolk*'s Case, in 3 *Chanc. Cases. pag.* 32 to 37, 48 to 53, &c. *Vide Post.* 131, 132, &c. 2 *Vern.* 288, and *N. B. ibid.* 737.

The Lord Chancellor.
The Maſter of the Rolls.
Chief Juſtice Hide.
Juſtice Twiſden.

Pollard *againſt* Greenvil.

Rep. Chan. Part 1. 184. S. C.
Vide Poſt. 17, 18, 104, 160, *&c. infra.*

THE Plaintiff lent the Lady Greenvil 100 l. and one Culliford, as her chief Agent and Friend, became bound for the ſame; and the Lady having Power to make a Leaſe in Poſſeſſion for one and twenty Years of her Eſtate, makes a Leaſe to Culliford for one and twenty Years, to ſecure him from the Debt aforeſaid, and ſeveral other Debts he was ingaged for the ſaid Lady; but the Leaſe was made to commence from a Time to come, which was void in Law, in reſpect her Power was but as aforeſaid; and Culliford had the Poſſeſſion for ſome Time, but was afterwards ouſted by Force by the Lady's Husband; but her Husband not long afterwards dying, ſhe enjoyed it for the Remainder of the Term; and Culliford being dead, and leaving no Aſſets, the Plaintiff therefore preferred his Bill here for the Debt aforeſaid. But for that it appeared to the Court that the Money was imployed for his Uſe who created the Truſt for Payment of Debts, and ſhe having received the Profits for thirteen Years, and for that the Leaſe was not good in Strictneſs of Law, yet the Court was ſatisfied that the ſame did amount to a good Declaration of her Power in Equity, to make the Leaſe for one and twenty Years in Being, and that the Receipts of Profits was alſo under that Power, and ſubject to the Truſt: And although the Defendant did ſet forth by Anſwer, that Culliford at the Time of his Death was indebted to her, yet the Defendant was decreed to pay the Debt.

A defective Execution of a Power made good in Equity.
See 1 *Vern.* 85, 355, 406.
2 *Vern.* 164.
Poſt. 18, 104, 160, 263, 264.
2 *Chan. c.* 29, 30, 87.
2 *Vent.* 350.
2 *Vern.* 80, 376, 379, 528, 531, 542, 665.

See the ſeveral Caſes on the Rule for making good the defective Execution of Powers, *&c.* in *Maxims of Equity*, Page 57, 58. and Lord *Coventry*'s Caſe, *ibid.* and in the New Caſes of *Law and Equity*, 2d. Part, *fol.* 12, 13. and *Poſt.* 104, 160, *&c.*

DE
Term. Sanct. Trin.

Anno Regis 14 Car. II.

IN
CANCELLARIA.

The Lord Chancellor.

Anonymus.

Upon a Demurrer after *Trinity* Term, 14 Car. 2. 1663.

THE Bill was barely to diſcover a Deed. The Defendant demurred, becauſe the Plaintiff had not made Oath, according to the Courſe of the Court, that he had not the Deed.

Where it behoveth that the Pl. make Oath of the Loſs, or Want of a Deed; and where not.
See 2 *Vern.* 561.
1 *Vern.* 59, 180, 247, 310, 452.
Poſt. 77, 78, 292, 231.
Max. Eq. 29.

Serjeant Glyn for the Plaintiff inſiſted, That the Oath was not required by the Courſe of the Court in this Caſe; and he took this Difference, That when the Bill alledgeth the Want of a Deed, and ſeeketh to be relieved upon the Matter of that Deed by a Decree, there ſuch Oath is neceſſary; but where the Bill ſeeks no Decree, but barely to have the Defendant diſcover whether he hath ſuch Deed or not, or to have the Deed produced at a Trial; in that Caſe the Plaintiff ought not to be put to his Oath, for it's not to be preſumed the Plaintiff would exhibit a Bill in either of the latter Caſes, if he had the Deed. This Difference was well approved of by the Lord Chancellor, and thereupon the Demurrer over-ruled.

Note the Caſe in 2 *Vern.* 561, *viz.* The Defendant had by his Anſwer ſwore, that he had in a Paſſion burnt his Marriage Articles at ſuch a Time, *&c.* but it being proved that he had produced them afterwards, he was committed. And though he made Oath that he had them not, nor could produce them, yet the Court would not diſcharge him 'till he conſented to the Articles as ſet forth in the Bill.

Sir Thomas Bennet, *and Sir* William Brownlow, *Knts. Plaintiffs, againſt* Mary Box, *Relict of* Henry Box, *and Daughter of* Ralph Allen, Walter Stonehouſe, *Son and Heir of* Elizabeth Stonehouſe, *another of the Daughters of* Ralph Allen, George Burdet, *Son and Heir of* Martha Burdet, *another of the Daughters of* Ralph Allen.

Note; Truſt Lands no Aſſets in Equity, tho' the Truſt be decreed in Equity. See the Notes, *Poſt.* 14, and *pag.* 128.

ANNO 15 Jac. Ralph Allen purchaſeth Lands in his own Name, and in the Name of Edward Hammond, in Truſt for Ralph Allen and his Heirs, and Hammond to take nothing thereby: But the Truſt is not expreſſed in the Conveyance. William Allen, Senior, did borrow 600l. of John Bennet, and the ſaid William Allen, Ralph Allen, and William Allen, Junior, Son and Heir of the ſaid Ralph Allen, (William Allen, Senior, being firſt bound in the Bond) 1630. did become bound unto the ſaid John Bennet, ſince deceaſed, for the Payment of the ſaid 600l. by Bond of 1000l. wherein they bound themſelves and their Heirs, under whom the Plaintiffs are well entitled to the Debt in queſtion. And one Witneſs depoſeth, That Ralph Allen was a good Husband, not one that contracted any Debts of his own, and believes he and William Allen, Junior, were only Sureties for William Allen, Senior. Ralph Allen dies, and Hammond ſurvives, and after dies; then William Allen, Son and Heir of Ralph Allen, dieth without Iſſue; and the now Defendants, as Heirs at Law, bring their Bill againſt the Heirs of Hammond, who had the Eſtate in Law, to have the Lands conveyed in Performance of the Truſt; which is decreed to them accordingly, and the Lands conveyed unto them as Heirs at Law of Ralph Allen.

Action at *Law.*

The now Plaintiffs bring their Action of Debt at Law againſt Henry Box, ſince deceaſed, and the now Defendants, as Heirs of Ralph Allen. The Defendants thereunto pleaded Riens per diſcent præter a third Part of a Meſſuage, worth 6l. 13s. 4d. per Annum.

January,

January, 1662. the now Plaintiffs bring their Bill in this Court against the Defendants, and Henry Box, the Defendant's late Husband, who had the Lands decreed and conveyed unto them as Heirs of Ralph Allen, to have them decreed as Heirs, to pay the just Debts of Allen, or to have the said Lands made liable to pay the said Debt as Assets in Equity. And Bill in Equity.

The Defendants, Box and Stonehouse, pleaded, That the said Action still depended, which is a double Vexation; and demur, and demand Judgment, Whether they, as Heirs, shall be charged in Equity, without any Trust or Agreement further than the Law chargeth them? Plea and Demurrer.

On hearing thereof, a Case was stated on the Bill, Plea, and Demurrer, and afterwards Henry Box died: And before any Bill of Revivor against the Defendants, it was ordered, May 12, 1653. That the Defendants do answer the Plaintiffs Bill; but the Benefit of the Plea to be considered at the hearing. Order on hearing.

The Defendants deny that they have entred into, or received any of the Profits of the said Lands, the same being ever since 7 Car. extended for the Debts of Ralph Allen, and ever since held by Sir John Banks and his Executors, and formerly before the Extents were let at 500 l. per Annum, and after at 300 l. per Annum, and now but at about 400 l. per Annum, and whereout above 60 l. is deducted for the Charges of the Sea-Banks, and the rest will not pay the Interest of the Principal Debt, as the Extendors alledge. Answer, &c.

An Original was fil'd by the Plaintiffs against Henry Box and the other Defendants, on the Bond in question in the Common Pleas, bearing Teste 16 Feb 1659.

The Defendant Walter Stonehouse did for 400 l. bargain and sell his third Part of the Reversion in Fee of the Lands in question, to Henry Box, deceased, by Deed bearing Date 3 Octob. 1660. and the said Henry paid then to the said Walter the 400 l. Purchase-Money for the same; and the Defendants, as they swear by their Answer, had not then, or in some Months after, any Notice of the said Original, and no Notice proved; and one Witness deposeth he believeth there was no Notice; for he being conversant in all Mr. Box's Affairs, if there had been any Notice, he should have heard of it, as he verily believes.

The Defendant George Burdet, after the other Defendants were ordered to answer, put in his Answer, and there-

thereby inſiſted on the ſame Matter the other Defendants did by their Plea and Demurrer, and was on June the 9th laſt paſt ſerved with Proceſs ad audiendum Judicium upon 21 June following, but appeared not at the Hearing, or any for him.

1. Queſtion, Whether the ſaid Lands, as this Caſe is, ſhall or ought to be decreed as Aſſets in Equity?

2dly, Or whether the Plaintiffs ought to have any Decree in this Caſe againſt the Defendants?

Truſt Lands no Aſſets in Equity, although the Truſt be decreed in Equity.
Ante 12. *Poſt.* 128, 248, 257.
2 *Vern.* 133, 134.
1 *Vern.* 172.

Chief Juſtice Hide, Chief Baron Hales, and Juſtice Windham, were of Opinion on hearing Counſel on both Sides, That the Lands in the ſaid Caſe and Bill mentioned (as the Caſe is ſtated) are not, nor ought to be decreed as Aſſets in Equity, and that the Plaintiffs ought not to have any Decree againſt the Defendants.

Afterwards in Hillary Vacation, 1664. the Bill was diſmiſs'd upon the Judges Certificate; and the like was 14 Nov. 1660. or 1661. in a Caſe wherein Clark was Plaintiff againſt Sir Thomas Fanſhaw.

Note in the Caſe of *Roper* and *Radcliff*, which ſee in the *New Caſes* of *Law and Equity*, 2d Part, *pag.* 167, &c. and 181, &c. it ſeems agreed as a ſtanding Rule in Equity, That Lands deviſed in Truſt to pay Debts and Legacies are to be deemed as Money (*i. e.* in Reſpect of *Creditors*, but not in Reſpect of the Heir at Law, or reſiduary Legatees.) *Vide Poſt* 248. And 2*dly*, That Money deviſed to buy Lands, is to be deemed as Land, &c. *Vide Poſt.* 16. in *pede.*

What are Aſſets in Equity *vide Poſt.* 128. and the Caſes there cited.

DE

DE
Term. Sanct. Mich.
Anno Regis 14 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
The Maſter of the Rolls.

Dr. Coldcot *againſt* Hill *and others.*

THE Caſe was to this Purpoſe: Dr. Coldcot having purchaſed Church-Lands in Fee under the Title of the Uſurper (during the Rebellion) ſold the ſame in Fee to the Defendant's Teſtator, and covenanted that he was lawfully ſeized, &c. The Church being reſtored, and the Eſtate voided, the Covenantee ſued the Covenant, and recovered Damages to the value of the Purchaſe-Money. To be relieved in this was the Scope of the Bill, which did ſuggeſt a Surprize upon the Plaintiff in getting him into that Covenant, and that it was declared by Dr. Coldcot, when he ſealed, and the Defendant's Teſtator, That it was intended Dr. Coldcot ſhould not undertake any further than againſt himſelf. Upon the Hearing, it was proved, That the Matter of the Covenant upon which the Judgment was had againſt the Plaintiff, was controverted in the Paper-draught, and put out by the Plaintiff's Counſel, and in again by the Defendant's Counſel, with the Alteration only, that whereas the Covenant was

Averment againſt a Deed. *Vide Poſt.* 46, 47, 48, & *infra.*

Relief for one who had entred into a general Warranty, where he intended but againſt himſelf only, and this after Eviction. 2 *Vern.* 186, 187, 189.

Note; 2 *Ventr.* 345. cites 1 *Roll.* 397. That an Averment of the Purport or Intent of a Deed is not to be admitted in Chancery.

Poſt. 24, 47, 226. Relief againſt one's own Act.

was, that the Plaintiff was lawfully ſeized, &c. the Plaintiff's Counſel put out [lawfully] which ſignified nothing; for to covenant one is ſeized, is intended lawfully. But ſome Proof being, that it was declared upon ſealing, that the Plaintiff ſhould undertake for his own Act only;

It was decreed, That the Defendant ſhould acknowledge Satisfaction on the Judgment, and pay Coſts. And a like Caſe to this between Farrer and Farrer was heard, and decreed after the ſame manner about ſix Months before.

For as Equity will relieve againſt Frauds and Accidents, ſo to prevent Wrongs and Miſchiefs, it will regard the primary Intent of the Parties, tho' contrary to the Words in the Covenants, Agreements, Releaſes, &c. See *Max. Eq.* N° 7 & 8. *per totum.* 2 *Vern.* 186.

The Lord Chancellor.
The Maſter of the Rolls.
Chief Juſtice Hide.

Lee *againſt* Hale. 31 Januarii.

By a Deviſe of the Moiety of a Perſonal Eſtate, what paſſeth.
Leaſes for Years are Part of the perſonal Eſtate.
See 2 *Chan. Ca.* 4, 5, 197.
2 *Vern.* 440. *Poſt.* 257.

1. RULED, That a Deviſe of the Moiety of the perſonal Eſtate to the Wife, and then of divers Legacies, and after of the Reſidue to another, that the Wife ſhall have a full Moiety, if the other Moiety be ſufficient to pay the Debts, and that the Debts ſhall go out of the other Moiety. Dyer 164. Againſt which it was objected, That the Husband could not bequeath any Part till the Debts paid, and that therefore the Debts ought to be firſt deducted out of the whole Goods. But that Objection was over-ruled; the other Moiety left being ſufficient for the Debts in his Caſe.

2. Ruled, That by the Bequeſt of a Moiety of the perſonal Eſtate, where the Teſtator had Monies, Bonds, and a Leaſe for Years, a Moiety of the Leaſe paſſed. Againſt which it was objected, That that was not uſually reckoned perſonal Eſtate.

Note the Caſe 2 *Vern.* 440, *viz. A.* dies inteſtate, leaving a Wife and two Daughters; 200 *l.* is found hid in a Wall, and another 200 *l.* in a Box; the Widow lays out the whole in a Purchaſe, and ſettles the Land on her ſelf for Life, Remainder to her Daughters in Tail, Remainder to her ſelf in Fee. She and her Daughters die, and the Adminiſtrator to the two Daughters brings a Bill againſt the Heir at Law for two thirds of the 400 *l.* out of the Land, as *perſonal Eſtate*; and 'twas decreed accordingly by the Maſter of the Rolls, but reverſed by *Lord Chancellor.*

DE
Term. Sanct. Hill.
Anno Regis 14 & 15 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Chief Juſtice Bridgman.
Chief Baron Hales.

The Lord Marqueſs of Antrim *againſt the Duke of* Buckingham. January.

THE Lady Antrim, Mother of the Defendant, being a Feme ſole, and ſeized of a Reverſion after one Life, ſettles the Lands to the Uſe of her ſelf for Life, Remainder in Tail, with Power for her, being ſole, to make Leaſes for three Lives in Poſſeſſion. The Feme marries, and then ſhe and her Husband make Leaſes for one and twenty Years (in the Life of Tenant for Life) to commence from the Date, for Payment of Debts, &c. as was alledged.

Powers how to be executed.
Vide ante 10.
Poſt. 104, 160, 263, *&c.*
1 *Chan. R.* 185.
2 *Vent.* 350.
Max. Eq. 58, 59.

1. Queſtion, If this Leaſe by Baron and Feme was good?

Vide Poſt. 21.

Bridgman. The Power is not purſued; for by the Marriage ſhe hath put her ſelf in the Power of her Husband; and it is the Deed of her Husband, and not hers. And he took a Diverſity between a naked Power and a Power which flows from an Intereſt; for when a bare Power is given to a Feme by Will, to ſell Lands, although ſhe marry ſhe may ſell, and may ſell the Lands to her Husband, becauſe it was not created by her ſelf out of any Intereſt of her own. But where a Feme upon a Settlement of her own Eſtate reſerves a Power which flows from an Intereſt, that Power ought to be executed by the Feme ſole; and if by Baron and Feme, it is not good. And yet he ſaid, Such Power ought to be taken liberally, though formerly they were taken ſtrictly.

Power to a Feme, how it is to be executed.
Vide Ante 10. *Poſt.* 104, 160, 263, 4.

2. Queſtion, If this Leaſe was a Leaſe in Poſſeſſion, inaſmuch as it commenceth at the Time of the Date?

For it was ſaid, Although an Eſtate for Life were before it, yet it was in Poſſeſſion, in Relation to the Eſtate of the Reverſion.

Where a Leaſe after an Eſtate for Life, is to be taken as in Poſſeſſion.
1 *Roll. Abr.* 381. X. *Pl.* 3.
Cro. Jac. 349.
2 *Bulſtr.* 216, 251.
Hob. 103.
2 *And.* 163, 164.
4 *Inſt.* 85.
Hard. 51.

Bridgman doubted whether the Leaſe was void in that Point; but was clear it was in the other Point.

Hales ſaid, Both Points are worth Trial and Argument at Law.

The Chancellor concurred with Bridgman, and the Bill was diſmiſs'd.

Fuller *and others againſt* Lance *and others.*

On a Commiſſion of Bankrupts, the Agreement of particular Creditors deny'd Relief.
2 *Vern.* 71, 602, 706.
Vide prox. pag.

FULLER being a Goldſmith in London, and being diſabled, agreed with moſt of his Creditors to aſſign over all his Eſtate upon Oath to ſeveral Perſons in Truſt for the Payment of his Debts, as far as his Eſtate would pay, he having ſuch Allowance for himſelf and Family as was agreed upon; and moſt of the Creditors ſign'd the ſaid Agreement; but ſome of the Perſons that ſign'd, finding that Fuller had done ſome Act of Violation of the Agreement, took out a Commiſſion of Bankruptcy againſt the ſaid Fuller, and ſeized all the Eſtate they could come by, and pretended

that ſome of the Creditors aforeſaid that ſigned the Agreement, and that were not privy to the ſuing out the Commiſſion, had Notice in due Time, though they had neglected the ſame, and that it was ſeven Months from the Date of the Commiſſion before the Commiſſioners aſſigned. And Fuller and other the Perſons concerned in the firſt Agreement, and excluded by the Commiſſion of Bankruptcy, being not compriſed, as aforeſaid, preferred their Bill againſt the Aſſignees of the Commiſſion of Bankruptcy, to have the Agreement performed, or at leaſt to be admitted to an equal Dividend with them. But this Court would give no Relief therein; and the rather, for that it was made appear that Fuller had made a Sale of ſome of the Goods he aſſigned to the Creditors; but diſmiſs'd the Bill.

See 2 *Vern.* 71, 602. 1 *Vern.* 208, 267, 8. 2 *Chan. R.* 226, 228. *Poſt.* 71, 232, 275, 307.

Of Sales by and Payments to Bankrupts, *vide* 1 *Vern.* 27. 94, 267. 2 *Vern.* 157, 203, 428.

Note, That where Committees of a Lunatick ſue for any thing in the Right of a Lunatick, in ſuch Caſe the Committee as well as the Lunatick are made Parties.

Committees of *Lunaticks*, to be made Parties.

Note alſo, ſuch Committees cannot make Leaſes, nor any way incumber the Lunatick's Eſtate without Leave of the Court. 1 *Vern.* 262.

And therefore ſhall not be allowed for Buildings or Improvements. *Ibid.* 263.

A Mortgage made by a Lunatick when *ſane*, and more Money afterwards taken up by the Committee on the ſame Mortgage, it ſhall ſtand as a Security only for the firſt Sum. *Ibid.* 262.

A Committee of a Lunatick inveſts his perſonal Eſtate in the Purchaſe of Lands in Fee; this ſhall ſtill be taken as perſonal Eſtate, and go to the Lunatick's next of kin, and not to his Heir. 2 *Vern.* 192.

A Settlement made by a Lunatick, though reaſonable, and for the good of his Family, is to be ſet aſide in Equity. 2 *Vern.* 414. But if one be found a Lunatick, and after becomes *ſane*, he may make Settlements, &c. See 1 *Vern.* 155.

And note the Cuſtody of an Ideot can't be to a Man, his Executors, and Adminiſtrators and Aſſigns 262.

DE Termino Paſchæ.

Anno Regis 15 Car. II.

IN CANCELLARIA.

The Lord Chancellor.
Windham *Juſtice.*

Sir Edward Heath *againſt* Henly *and* Whitwick.
May 25.

A Truſt out of the Statute of Limitations.
1 *Roll. Abr.* 378. *Pl.* 4.
March 129. *Poſt.* 26.
2 *Chanc. Caſes*, 217.
Poſt. 26.
3 *Chan. R.* 8.

THE Plaintiff was Son and Executor of the late Chief Juſtice Heath (who was made Chief Juſtice at Oxon during the Difference between the King and Parliament, but never ſate as Chief Juſtice in Weſtminſter-Hall; And the Bill was to have an Account of Monies received by the Defendants being Prothonotaries of the King's Bench, which was alledged to belong to the ſaid Chief Juſtice, and which Monies they by their Office ought to receive for the Chief Juſtice by an imply'd Truſt, virtute Officii. The Defendant pleaded the Statute of Limitations, 21 Jac. 16.

So is a Legacy, &c.
1 *Vern.* 256, 556.

Upon the arguing of this Plea, it was inſiſted by the Plaintiff's Counſel, that this Truſt was not within the ſaid Statute. And it was anſwered of the other Part, that a Guardian was within the Statute, and he was truſted. Ordered that the Defendants ſhould anſwer.

To what Caſes in Equity the Stat. of Limitations ſhall extend, or not, ſee 1 *Vern.* 73, 256, 456. 2 *Vern.* 141, 235, 398, 540, 694, &c.

The Lord Chancellor.
The Maſter of the Rolls.

Dorothea *Dame* Darcy *againſt* Chaloner Chute, Henry Haughton, *and others.*

THE Plaintiff being a Widow, and ſeized of a Jointure worth 700l. per Ann. Mr. Chute the Father made ſuit to marry her, and ſhe agreeing to it, he before the Marriage agreed with her by Deed in writing, that it ſhould be lawful for her, or ſuch as ſhe ſhould appoint, during the Coverture, to receive and diſpoſe of the Rents of her Jointure as ſhe pleaſed.

Marriage determines an Agreement made by Baron with Feme before Marriage.

The Deed was put in Haughton's hands, he being the Plaintiff's Agent formerly.

Then the Plaintiff and Mr. Chute married, he having firſt agreed with Truſtees of hers to ſettle her a Jointure; and they lived together ten Years, during all which Time Haugton received the Rents of the Lady's ſaid Jointure of 700l. per Ann. and conſtantly, with the Approbation of the Plaintiff, accounted for, and paid the ſame to Mr. Chute, her Husband. And the Plaintiff all that Time never appointed Haughton to receive the Rents for her, nor claimed any Benefit by the Agreement left in Haughton's hands; but at the ten Years end Mr. Chute dying, having made the Defendant his Son Executor, the Plaintiff exhibited her Bill to have an Account from Haughton, and charged 1000l. to be reſting in his hands unaccounted for, that was received in Mr. Chute her Husband's Life-time, and ſhe made Title to the ſame by the ſaid Agreement made by Mr. Chute with her ſelf before Marriage. And upon the Hearing (a Caſe being cited and urged by the Defendant's Counſel) the Court declared the aforeſaid Agreement before Marriage with the Plaintiff her ſelf, was immediately by the Marriage extinguiſhed; the Court would not relieve the Plaintiff thereupon, but ordered the Defendant Haughton to account before a Maſter for what he received after Mr. Chute's Death.

Of Marriage Agreements, *Ant.* 18. *Poſt.* 117. 1 *Vent.* 343. 1 *Vern.* 15, 68, 198, 203, 218, 320, 369, 298, 9, 471, 406, 408, 433, 463, 448. and 2 *Vern.* 14, 83, 263, 289, 295, 448, 499, 764.

DE

DE

Term. Sanct. Trin.

Anno Regis 15 Car. II.

IN

CANCELLARIA.

The Lord Chancellor.
Chief Juſtice Hide.
Chief Baron Hales.

Sir Henry Bellaſis *and his Wife againſt Sir* William Ermine. June 4.

Upon a PLEA.

THE Suit was for a Portion of 8000 l. given to the Plaintiff's Wife. The Defendant pleaded it was given her, provided ſhe did marry with the Conſent of A. and if not, ſhe ſhould have but 100 l. per Ann. and that ſhe married without the Conſent of A. Ordered that the Plea ſtand over-ruled.

And the Court all declared this Proviſo was but in terrorem, to make the Perſon careful, and that it would not defeat the Portion.

But it was ſaid in the Caſe of her Marriage without the Conſent of A. if the Party that gave the Portion had limited it to another, there it had been otherwiſe. And in this Caſe the Wife was not unequally married; for the Plaintiff is the Heir apparent at Law of the Lord Bellaſis.

Where the Condition annexed to the Gift of a Portion ſhall defeat the Portion, and where not.
1 *Modern* 308.
2 *Vent.* 352.
Poſt. 140, 141.
1 *Vern.* 20.
Poſt. 51, 52, &c.

And it ſeems that ſuch Conditions in Reſtraint of Marriage, when annex'd to Deviſes, Legacies, Portions, &c. except there be a Special Limitation over, are void. See 1 *Vern.* 20, 222. 2 *Vern.* 333, 721.

The Lord Chancellor.

Pawcy *against* Bowen. June 26.

A Leaſe for more Years than the Leſſor had power for, ſhall be good for ſo many Years as he had Power for. *Vide ante* 10, 17. *Poſt.* 263, 264.

Reſolved, that where a Perſon hath Power to leaſe for ten Years, and he leaſeth for twenty Years, that the Leaſe for twenty Years ſhall be good for ten Years of the twenty, in Equity. And it was ſaid to have been ſo ſettled ſeveral Times in this Court.

Note; As there is a great Difference between a Non-Execution and a defective Execution of Powers; ſo there ſeems to be between both the former and a ſupererogate Execution thereof. *Vide* 1 *Vern.* 407, 355. 2 *Vern.* 80, 513, 559.

Criſpe *and others, Executors of Sir* Nicholas Criſpe, *againſt* Blake. June 26.

Money paid a whole Term after Judgment given; but before the actual Entry thereof, is to be taken as paid on the Bond, and not on the Judgment.

In 1642. Sir Nicholas Criſpe, and four others became bound to the Defendant's Teſtator in 1600 l. for the Payment of 1000 l. and Intereſt at ſix Months end. Intereſt was paid till 1644. In Michaelmas 1662. the Defendant got Judgment againſt Sir Nicholas Criſpe, and one other of the Obligors for 1600 l. (being the Penalty.) Afterwards there was paid by them, againſt whom the Judgment was, and the other Obligors, at ſeveral Times, to above 1600 l. And ſo the Bill was to have the Judgment vacated, and the Bond delivered up, paying ſo much as would make up the Penalty of the Judgment, and Intereſt for the ſame ſince the Judgment.

It was inſiſted on by the Plaintiffs Counſel, That when Judgment was had on the Bond, it remained no longer a Debt on the Bond, nor was Intereſt due on the Judgment; ſo what was paid after muſt be taken as paid on the Judgment; and if they had brought that 1600 l. into Court at Law, (and offered to pay it before Execution) the Court at Law would have accepted it. And therefore, being willing to make up what was paid already the full of the Judgment and Damages ſince the Judgment, ought to be relieved againſt the Judgment.

On the Defendant's Part it was inſiſted, That there was more Money due for Intereſt on the Bond, and that that was paid as well by thoſe Obligors againſt whom there was no Judgment, as by thoſe againſt whom the Judgment was;

was; and what was paid by those against whom there was no Judgment, their Part of what was paid in by the Course of the Court was to be taken as Interest, there being more Interest due on the Bond than the Money paid; and there is no Equity in this Case to hinder the Defendant from recovering of what he can at Law, there being much more in Conscience due; and if what is justly due be to be received by any Course of Law, no Equity ought to hinder it, so as he do not receive more than Principal, Interest and Costs, which the Defendant offers to take on Account.

Ant. 14. *Post.* 226. He that takes a Security by a Penalty, ought not to have more.

Nor indeed so much, if Compensation for the Damage may be made without it. *Vide Max. Eq.* 44, 45, *&c.* there cited.

It was replied by the Plaintiff's Counsel, That one Satisfaction by any of the Obligors, shall be a Discharge at Law for the rest; and a Release to one Obligor is a Discharge to all the rest. And when a Man takes a Security by a Penalty, he sets up his Rest there, and makes himself Judge of what he would have, and ought not to have more. And after a long Debate, where the Case of Whitchcot and Underhil was cited, it was ordered, That the Plaintiffs do pay so much, with what was paid, as will make up the Penalty of the Judgment and Damages at 6*l.* per Cent. for the Penalty and Costs here and at Law, and thereupon the Bond to be delivered up, and the Judgment vacated: But with this Proviso, That if 250 *l.* paid in November 1662. were paid before the Judgment entred into, and the Judgment entred after of that Term, that that must be taken as paid as Interest, because the Defendant received it on the Bond, the Judgment then not being entred, which a Master is to examine; and if he find it, to allow the same as paid on the Bond for Interest, and the Master to take the Account.

A Judgment on Bond worse Security than the Bond only. *Vide Post.* 55.

So note, That a Judgment on a Bond, on which there is more due than the Penalty for Principal and Interest, is worse Security than the Bond only. This seems very hard and unreasonable, and the Equity hereof may well be questioned.

The Lord Chancellor.

Smith *againſt* Oxenden.

The Factor ſhall have the Benefit of Cuſtoms ſaved, and not the Imployer. *Vide Poſt.* 30, 76. *Max. Eq.* 24. 2 *Vern.* 638.

THE Caſe was, The Eaſt-India Company ſued their Factor for an Account of 12000 l. in Gold he carried hence into the Eaſt-India. He upon his Account demanded (according to the uſual Cuſtom) Allowance for ſo much paid for Cuſtoms to the King in India. It was inſiſted, That he never paid the Cuſtoms there for the Gold: So whether the Factor or the principal Merchant ſhould have the Benefit of the Cuſtoms, was the Queſtion.

And this was referred to Merchants. And two Merchants certified, That by the Courſe of Merchants, the Factor ſhould retain the Benefit of the Non-payment of the Cuſtoms, for that if the principal Freight by his Non-payment of the Cuſtoms had been loſt, he muſt have anſwered for it to the Imployer, and ſo run the Hazard wholly. And in this Caſe the Factor, by the Law in Eaſt-India, had it been diſcovered that he had concealed the Gold, and not entred it into the Cuſtom-Books, was to have loſt his Life as a Felon.

Two other Merchants certified, That the Imployer was to have the Benefit of the Non-payment of the Cuſtoms. And upon theſe Certificates, it was decreed, That the Factor ſhould have the Benefit of the Cuſtoms, for it was a Duty to be paid, and the Imployer could make no Title to it againſt him that was in Poſſeſſion; and he that hath Poſſeſſion hath Right againſt all but him that hath the very Right. Vide Borr againſt Vandale. Poſt. 30.

And yet a Factor is only in Nature of a Truſtee for his Principal. 2 *Vern.* 638.

Randal *againſt* Richford. June 2.

Witneſs, ſurpriſed, &c. See 2 *Vern.* 344. And *Nota ibid.* 463. *Poſt.* 29.

A Witneſs alledged he had miſtaken himſelf at a Commiſſion. The Commiſſion being returned, he came to London, and made Oath that he was ſurpriſed. A Special Commiſſion iſſued, to re-examine the Witneſſes, which was done accordingly; but this Special Commiſſion was ſuperſeded by Motion, by Advice of the Maſter of the Rolls, with the ſix Clerks, as contrary to the Courſe of the Court.

DE
Term. Sanct. Mich.
Anno Regis 15 Car. II.
IN
CANCELLARIA.

Chief Justice Hide.

Sheldon *against* Weldman. October 11.

Upon a PLEA.

THE Bill was to have an Account of Money delivered by the Plaintiff's Father (whose Executor the Plaintiff was) to the Defendant to compound for the Plaintiff's Father's Estate (sequestred for Delinquency) at Goldsmiths Hall.

Money upon a Trust, out of the Satute of Limitations.
1 *Roll. Abr.* 387. *Pl.* 4.
March 129. *Ant.* 20.
2 *Chanc. Cases* 217.

The Defendant pleaded the Statute of Limitation of Accounts, 21 Jac. 16. Upon arguing his Plea, it was insisted by the Plaintiff's Counsel, That an Account for Monies delivered upon a Trust was not within this Statute, and that it had been so ruled; and thereupon the Plea was over-ruled, and the Defendant ordered to answer.

Lord Chancellor.
Justice *Windham.*
Justice *Twisden.*

And in Trinity Vacation, 16 Car. 2. the Case being heard by the Lord Chancellor, Justice Twisden, and Windham, the two Judges and the Lord Chancellor declared, and were of Opinion, That the Statute of Limitations did not bar this Suit, because it was on a Trust that the Defendant had the Money for which the Account was sought. But for another Reason the Bill was dismis'd.

The

And so in the Case of *Lawly* and *Lawly*, *Trin.* 9 *Geo.* in *Canc.* a Plea of the Stat. of Limitations was over-ruled, because the Estate in Law was in Trustees. See *New Cases in Law, &c.* pag. 33.

The Lord Chancellor.
Chief Justice Hide.

Nanney *against* Martin. October 15.

Baron and Feme have a Decree for Money in the Right of the Wife, and then the Baron dies. A Question is moved, Who shall have the Benefit of the Decree, whether the Wife, or the Executor of the Husband?

And this Case being referred to Chief Justice Hide, he had given his Opinion, That the Benefit of the Decree belongs to the Wife, and that it was so in a Judgment at Law. And Exception being taken to that Certificate of the Judge, he refused to hear the Matter of the Exception, but left it to the Chancellor; but declared his Opinion was still the same. And 18 Jan. 1663. at the Seal, the Lord Chancellor would not refer it back, but confirmed the Judge's Certificate.

Rep. Chan. 233. 2 *Vern.* 43, 401. The Benefit of a Decree by Baron and Feme belongs to a Feme, and not to the Executor of the Husband. *Vide Post.* 41, 43, 194, 207, 307, 225, 266.

What Rights or Interests remain to the Wife, or her Executors, &c. on the Husband's Death, *vide* 1 *Vern.* 244, 245, 326. 2 *Vern.* 328, 9, 17, 61, 64, 67, 68, 120, 190, 386, 486, 494, 501, 2, 535, 566, 604, 626, 659, 689, 707, 762, 671, 752, 493, and note *ibid.* 683.

Chief Justice Hide.

Gervas Scroope, *an Infant, against Sir* Adrian Scroope. October 15.

A Bill was to be relieved touching the Manor of Gidley in Lincolnshire, and sets forth, That Gervas Scroope, deceased, Father of the Defendant, and Grandfather of the Plaintiff, was seized in Fee thereof, and devised the same to the Plaintiff and his Heirs; and that the Defendant having gotten all the Writings, laid Claim to the same, and got into Possession thereof, and did pretend that the said Manor was purchased heretofore in the Name of the said Sir Gervas and him, and to their Heirs, and that so Sir Gervas had no Power, being Jointenant, to devise the same; whereas his, the said Defendant's Name was used in the said Conveyance in Trust for the said Gervas, and the Purchase was made, and the Money paid by Sir Gervas; and that so the

Lands purchased by two shall not be presumed in Trust for one of them. Of Trusts, *vide* 8, 9, 20, 68, 191, 208, 299, 128, 257, 268, 296, 280, 287, 298, 311, 134, 176.

Defendant's Title was but as a Truſtee for Sir Gervas, and conſequently for the Plaintiff, to whom Sir Gervas had deviſed the ſame.

The Defendant pleaded, That the Premiſſes were the 19th of June, 13 Car. 1. by good Conveyance in Law well executed, for 4600 l. really and bona fide paid, conveyed by J. S. to Sir Gervas Scroope, and the Defendant, and their Heirs, the Defendant being the Son and Heir apparent of Sir Gervas; and that the ſaid 4600 l. was raiſed by Sir Gervas by Sale of the Lands, which were the ancient Inheritance of the Family, and which, if they had not been ſold, had deſcended on the Defendant; and averred, That all the Courts of the ſaid Manor that were kept in Sir Gervas's Life were kept in as well the Defendant's Name, as in Sir Gervas's Name; and that the ſaid Conveyance to Sir Gervas and him, was really and bona fide without any Truſt for Sir Gervas or any other; and that Sir Gervas being dead, the Defendant claimed the Premiſſes by Survivorſhip, and demanded Judgment.

The Plaintiff did not attend, but was alledged to be out of Town, and pray'd it might ſtand for another Day. But the Court direcing the Plea to be opened, which was done, and afterwards read, declared it clearly to be a good Plea, unleſs the Plaintiff could prove an expreſs Truſt; and if he could have done that, he ought to have reply'd; but not having reply'd, the Plea muſt be taken to be true; and that albeit the Purchaſe was made by the Father in his own and his Son's Name, it ſhould prima facie be intended an Advancement for the Son, and not preſumed a Truſt, unleſs declared ſo; and that it was anciently the Way to join the Son in a Purchaſe, to avoid Wardſhip. And the Caſe of Criſp againſt Prat, 1 Cro. 550. and Sir Sidney Mountague's Caſe there, were in the Debate of this Caſe urged; and the Court declared to the Defendant's Counſel, this being the Caſe, that nothing could be ſaid againſt the Plea, and ſo allowed it. 17 November, 1663. the Plea was re-heard, and upon Argument on both Sides was allowed, with double Coſts.

The Father joins the Son with him in the Purchaſe, it ſhall not be preſumed a Truſt in the Son, unleſs it be expreſly declared.
Vide Poſt. 33, 296. 2 *Vern.* 323, 385, 430, 545, 683.

Touching Purchaſes with or without Notice, *vide Poſt.* 34, 36, 39. 1 *Vern.* 465. 2 *Vern.* 255, 281.
How far Purchaſers are favoured in Equity, *vide* 1 *Vern.* 52, 136, 286, 465, 467. 2 *Vern.* 255, 281, 327, 701, and 2 *Vent.* 339, 343.

The Lord Chancellor.
The Maſter of the Rolls.

Chute *againſt the Lady* Dacre. October 23.

THE Defendant having miſtaken her ſelf in her Anſwer, as was alledged, having therein ſworn ſomething which was found by her afterwards to be otherwiſe; it was alledg'd by her Counſel, and Affidavit made by her ſelf too for that Purpoſe, That thoſe Matters untruly ſet forth were added in the Margin of the Draught after ſhe had peruſed it, and ſo ſhe was thereby ſurprized. And it was alledged, That no Replication was filed prout Certificate, and Affidavit of Notice of this Motion to the other ſide was read. But the Plaintiff making no Defence, it was ex parte, on the Defendant's Motion, ordered, That ſhe be at Liberty to amend her Anſwer in the ſaid Matters miſtaken. And it was ſaid, That like Liberty had been given to a Defendant to amend his Anſwer before Replication in a Caſe between Chettle and Chettle in the Lord Coventry's Time.

Liberty for the Defendant to amend her Anſwer, ſhe being ſurprized therein.
See 2 *Vern.* 344. 1 *Vern.* 344. *Ant.* 25.

At the Rolls, the Maſter of the Rolls.

Manning *againſt* Burges. October 26.

A Mortgage was forfeited, the Mortgagor afterwards meeting the Mortgagee, ſaid, I have Monies, now I will come and redeem the Mortgage. The Mortgagee ſaid to him, He would hold the mortgaged Premiſſes as long as he could; and then when he could hold them no longer, let the Devil take them if he would. And afterwards the Mortgagor went to the Mortgagee's Houſe with Money more than ſufficient to redeem the Mortgage, and tender'd it there; but it did not appear that the Mortgagee was within, or that the Tender was made to him; And it was decreed a Redemption, and the Defendant to have no Intereſt from the Time of the Tender, becauſe of his Wilfulneſs.

A like Caſe between Peckham and Legay about a Year ſince.

A Mortgagor refuſing to receive his Money on Tender after Forfeiture, ſhall loſe his Intereſt from the Tender.

Of Rules for paying Intereſt, &c. on Mortgages, ſee 1 *Vern.* 168. 2 *Vern.* 134, 145, 289, 290, 316, 392. 3 *Chan. R.* 79, 81, 105, 130, 148. 2 *Chan. R.* 87, 286. 1 *Chan. R.* 212, 213. *Poſt.* 258.

The

The Lord Chancellor.
The Maſter of the Rolls.

Borr *againſt* Vandall. October 27.

Whether Factor or Imployer ſhall have the Benefit of Cuſtoms ſtolen by the Factor.
Ant. 25.
Poſt. 76.
Max. Eq. 24.

THE Factor had ſtolen the Cuſtom of divers Goods, of which the Bill was to have an Account, and to diſcover whether he paid thoſe Cuſtoms or no. The Defendant by Anſwer inſiſted, That he was not bound to anſwer that Part of the Bill, for that the Plaintiff, who was the Imployer, was not intitled to thoſe Cuſtoms, nor any Advantage, whether they were paid or not. Exception being taken to this Anſwer, the Maſter certified the Anſwer ſufficient. Exceptions being taken to the Report, the Cauſe came now to be heard upon that; and the Cauſe of Smith and Oxenden, fol. 25. was cited. But on the Plaintiff's ſide it was inſiſted, That this Caſe was not like that; for that was of Cuſtoms ſtolen from a Foreign King, and this was of Cuſtoms ſtolen from our own King; and that it would be of evil Conſequence, and an Encouragement to evil Factors, if the Court ſhould give an Opinion for them in a Matter of Fraud, as this was. And whereas it was inſiſted by the Defendant's Counſel, That it was the Courſe of Merchants that Factors ſhould have the Benefit of Cuſtoms themſelves, and not the Principals, becauſe the Penalty would fall on the Factor if diſcovered: It was declared, that could not be called a Cuſtom, being grounded upon Fraud; and therefore the Court ordered, That the Defendant ſhould anſwer whether he paid the Cuſtoms or not. Vide Smith againſt Oxenden, fol. 25.

The Lord Chancellor.

Rich *againſt* Jaquis. October 29.

Certiorari Bill brought to hearing.
See 3 *Chan. R.* 66. *Curſus Canc.* 7, 453, 454.

RICH was Plaintiff upon a Certiorari Bill to remove a Cauſe out of the Mayor's Court, his Witneſſes being out of that Juriſdiction, and the Bill here was for an Account touching other Matters. Witneſſes being examined, the Defendant moved for a Procedendo, and inſiſted upon it, for that if the Cauſe ſhould be heard here, he could not be relieved, not having any Bill here, being here but Defendant, though Plaintiff in the Mayor's Court.

Whereunto the Plaintiff's Counſel inſiſted, That no Procedendo ought to be; for that this Bill containing other Matters, could not be determined upon the Bill in the Mayor's Court, and that the Bill could not be divided; and that the Plaintiff in the Mayor's Court might file his Bill in the Mayor's Court in this Court, and direct it to the Chancellor, and have the ſame Remedy here as he could there.

Ordered, that the Cauſe ſtand to be heard on the Bill in this Court. And after hearing, the Cauſe was diſmiſs'd out of this Court.

The Lord Chancellor.

Jew *againſt* Thirkwell. October 30.

Apportionment of a Rent in Equity, where it cannot be in Law, *vide Poſt.* 223, 246, 271. 1 *Chan. R.* 35, 120, 150. 1 *Vern.* 347, 404. 2 *Vern.* 103, 359, 510.

THE Plaintiff was Leſſee of divers Lands, whereupon an intire Rent was reſerved. Afterwards the Inhabitants of the Town where Part of the Lands lay, claimed Right of Common in Part of the Lands ſo let; and upon a Trial of their Right, are found to have Right of Common there. Now this being but a Right of Common recovered, is no Eviction of the Land in Law, becauſe the Soil was not recovered, and ſo no Apportionment could be at Law; and therefore the Bill was to have the Rent apportioned in Equity.

And

Vide Poſt. 223, 246, 271.

And Serjeant Maynard inſiſted, That ſuch Appoꝛtionment had frequently been decreed here. But in this Caſe it appearing, that notwithſtanding the Right of Common, the Lands were woꝛth the Rent reſerved, and better; the Court would not decree it, but the Bill was diſmiſs'd.

Woleſtoncroft *againſt* Long. November 6.

Poſt. 246, 249. Debts on Bond and ſimple Contract, to be paid in equal Proportion where Lands are to be ſold for Payment of Debts. So of Debts and Legacies. *Vide Poſt.* 136, 137, 223, 246, 271. 1 *Vern.* 347, 404. 1 *Chan. Rep.* 35, 120, 150.

A Debtoꝛ upon Bonds and ſimple Contract makes a Conveyance of Lands upon Truſt to ſell foꝛ Payment of his Debts. It was declared to be the conſtant Practice, and ſo ruled and decreed here, That all the Debts ſhould be paid in Propoꝛtion; and that if the Lands were not ſufficient to pay all, all ſhould loſe in Propoꝛtion. And ſo it is where Lands are given to pay Debts and Legacies, they ſhall be paid in equal Propoꝛtion, becauſe the Land is made liable to the one as well as the other by the Debtoꝛ himſelf. But otherwiſe it is in Caſe of Debts on Judgments, that in their own Nature charge the Lands.

The Lord Chancellor.

Baker *againſt* Beaumont. November 6.

A Re-commitment to the *Fleet*, after his being removed to *B. R.* See 1 *Chan. R.* 32.

ONE in the Fleet foꝛ Breach of a Decree, foꝛ not vacating of a Judgment, by Judgment in a feigned Action in the King's Bench, gets himſelf turned oveꝛ thither, and ſo had Liberty to go abꝛoad, and got the Defendant in the Judgment taken in Execution in Exon, and on a Habeas Corpus he was bꝛought hither, and re-committed to the Fleet, and confined to his Chamber, and a Habeas Corpus with a long Return foꝛ the Defendant in the Judgment, granted.

For Attachments, Commitments, &c. *vide Poſt.* 185. 3 *Chan. R.* 41, 65. 1 *Chan. R.* 56, 57, 67, 262. 1 *Vern.* 172, 187.

The Lord Chancellor.
Maſter of the Rolls.

Ayre *againſt* Ayre. November 10.

THE Plaintiff being the Widow of her Husband, ſued the Defendant, who was his Executor, to have Allowance of a Satisfaction for ſeveral Debts of the Teſtator's (which ſhe, having poſſeſs'd her ſelf of his Eſtate, had paid) the Executor having gotten all the Eſtate out of her Hands. It was much controverted, Whether ſhe ſhould be help'd herein? For tho' Executor of his own Wrong ſhall be allowed all Payments made to any but himſelf, yet ſhe was not Executrix of her own Wrong; for where there is a rightful Executor, as here, there can be no Executor de ſon tort. Yet it reſembled that Caſe; and the Court doubting much what to do in this Caſe, decreed by Conſent of Counſel, That ſhe ſhould be allowed for all Payments that ſhe had made which were incumbent on the Executor to pay, according to the Courſe of Law; but that if ſhe had made any Payments out of Order and Rule that the Law left the Executor liable to, that ſuch Payments ſhe ſhould not be allowed for, if they were to the Prejudice of the Executors.

A Widow paying juſt Debts of her Husband out of his Eſtate in her Hands, ſhall have Allowance for the ſame from the Executor. *Vide Poſt.* 38.

Note; The Wife here ſeems to be taken as a Creditor to the Husband's Eſtate, and in ſuch Caſe ſhall be relieved againſt the Executor. See 1 *Vern.* 369. 2 *Vern.* 37, 62, 299, 306, 325.

In Court.

Sackvile *againſt* Dobſon. November 10.

LImitation of the Truſt of a Term to Husband and Wife, and the longeſt Liver of them, for Life, and after to the eldeſt Iſſue of them, none being then born; a good Limitation. So the Limitation to Husband and Wife is but one Limitation; and ſo it was admitted by Counſel, it being not controverted; for tho' the Truſt of a Term, according to the Rule in Goring and Bickerſtaff's Caſe, fol. 4. may be limited to divers Perſons that are in Being, one after another, becauſe the ſame is transferrable, yet it cannot be good beyond two Limitations to a third Perſon not in

Limitation to Huſband and Wife is to be accounted as one Limitation in the Truſt of a Term. *Vide Ant.* 28.

Perpetuity, *vide Ant.* 8. *Poſt.* 213, 230, 239.

Being: Ergo, The Limitation to Husband and Wife, and longeſt Liver of them, was admitted to be but one Limitation in this Caſe.

The Lord Chancellor.
Juſtice Tirrel.

More *againſt* Mayhow. November 10.

THE Plaintiff's Bill was to be relieved upon a Truſt, and charged the Defendant with Notice of that Truſt, and that he had gotten a Conveyance of the Lands upon which the Truſt was had; and that at or before his taking the ſaid Conveyance, he had Notice of the ſaid Truſt for the Plaintiff.

The Defendant, by way of Anſwer, denied that he had any Notice of the Truſt at the Time of his Purchaſe or Contract, and pleaded that he was a Purchaſer for a valuable Conſideration. It was inſiſted the Plea was not good, becauſe he did not ſay what the valuable Conſideration was; for 5 s. was a valuable Conſideration; but yet no equitable Conſideration.

Purchaſer without Notice.
Vide Poſt. 35, 36, 37, 38.
Ant. 28. & *infra.* Conſideration valuable. *Poſt.* 49, 78, 99.
New Caſes in Equity, 83, 84, &c. 132.

The Court declared that the Plea in this Caſe was well enough.

Hardreſs 160, 216.
2 *Vent.* 361.
2 *Chanc. Caſes* 161.
1 *Chanc. Caſes* 39.

It was further inſiſted, That the Plea was founded upon the Anſwer, viz. That the Defendant had no Notice, &c. And that the Point of Notice was not well anſwered, in that the Defendant denied Notice at the Time of the Purchaſe only, and the Word Purchaſe might be underſtood when the Contract for the Purchaſe was made; and it might be he had no Notice then, and might have Notice after, before, or at ſealing of the Conveyance; And if there was any Notice before the Conveyance to him executed, that ſhould charge the Defendant: And that it was ſo lately decreed in a Cauſe between Sir William Wheeler and .... and Yarraway and Nicholas, by the Lord Chancellor. And ſo the Plea was overruled.

Notice of an Incumbrance any Time before the Conveyance executed, ſhall bind him.

Vide Ant. 28. *Poſt.* 35, 36, 38, &c. *ibid.* And note; a Purchaſer without Notice of Incumbrances, is to be favoured in Equity. 2 *Vent.* 339, 343.

Garfoot *againſt* Garfoot. November 10.

On a Demurrer.

LANDS were deviſed to the Feme for Life, afterwards to be ſold by the Executor for younger Childrens Portions; the Executor dies, the Feme dies; the younger Children prefer their Bill againſt the Heir; he demurs, becauſe but an Authority in the Executor, which is dead with them: but the Demurrer was over-ruled.

Lands deviſed to be ſold by Executor, who dies; the Bill brought againſt the Heir, who demurs, and over-ruled.
4 *Leon.* 8.
2 *Vent.* 350.
1 *Levinz.* 238.
Poſt. 104, 159.
2 *Chanc. Caſes*, 30, 68, 69.

Regnes *againſt* Lewis. November 17.

On a Demurrer.

THE Demurrer was, for that a Feme Covert ſued without her Husband. But ſhe being to be relieved touching a ſeparate Maintenance agreed to by her Husband, the Court over-ruled the Demurrer, declaring the Feme might ſue without her Husband.

Wife ſues for ſeparate Maintenance without the Husband.

Of Suits touching ſeparate Maintenance, *vide* 1 *Vern.* 53, 71, 204, 244, 245, 326. 2 *Vern.* 386, 493, 671, 752. 1 *Chanc. R.* 44, 164, 224.

The Lord Chancellor.
Baron Turner.

Churchil *againſt* Grove *and others.* Novemb. 24.

On a PLEA.

THE Plaintiff having a Judgment and a Mortgage, exhibited his Bill againſt the Mortgagor and Conuſee of a Statute by the Mortgagor, to have a Diſcovery what is due on the Statute, that being precedent to the Plaintiff's Securities, and upon Payment to have the ſame ſet aſide.

Purchaſer without notice, *vide Ant.* 34. *Poſt.* 36, 37, 38.

The Cognizee pleaded, That he having extended his Statute, and the Cognizor and he stated Accounts, and the Sum of 3000 l. being due to him, he in Consideration thereof had an absolute Conveyance of Part of the extended Lands, and shewed what Lands were conveyed to him by the Cognizor, and that thereupon he assigned the Residue of the extended Lands to the Cognizor; and that so he was a Purchaser without Notice of the Plaintiff's Title, for a valuable Consideration.

It was also pleaded, That the Cognizor was in Execution on the Plaintiff's Judgment, and so the Plaintiff could not extend the Lands, nor the Lands be liable during the Life of the Cognizor.

On the Plaintiff's Part, it was to the first Point insisted, That it did not appear that the Defendant was a Purchaser, there being no new Money paid upon the executing the Conveyance; but coming in for the Consideration of Money due on the Statute, was no Purchase. And that it was common Equity for him that had the subsequent Judgment to be relieved against the precedent Statute on Payment of what was due; and that there was, for ought appeared, no more there; and that the Account made up between the Cognizor and Cognizee on the pretended Purchase ought not to affect the Plaintiff; and that therefore the Defendant's Purchase being subsequent to the Plaintiff's Security, ought not to be aided by the Statute; and that the Plaintiff's Judgment being of Record, the Defendant was bound to take Notice thereof at his Peril; and that in this Case the Defendant ought not to protect his pretended subsequent Purchase by his precedent Statute; but that he ought, upon Payment of the Statute, to yield Possession to the Plaintiff.

But this was strongly opposed by the Defendant's Counsel, who insisted that the Defendant was a Purchaser; and that though no new Money was advanced on the Purchase, yet he assigned over and parted with Part of the extended Lands in Consideration thereof, which was as valuable as Money. And that it was the constant Justice of this Court, that if a Purchaser bona fide did buy in an eigne Incumbrance, Statute or Judgment, and there were a Judgment or Statute mesne between that and his Purchase, of which he had no Notice at his Purchase, that he should protect his Purchase with the eigne Incumbrance so brought in. And it was insisted, That though Judgments were on Record,

2 *Vent.* 337, 338. *Hard.* 173. 2 *Chanc. Cases* 208, 20, 35, 213. 1 *Chanc. Cases* 162, 163, 201. Purchaser shall protect his Purchase by buying in an eigne Incumbrance. See 1 *Vern.* 49, 52, 187, 335. 2 *Vern.* 29, 30, 66, 81, 157, 159, 160, 271, 304, 524.

cord, and a Purchaſer is bound to take Notice thereof at Law, yet in Equity, where the Cognizee of a Judgment comes to be help'd to extend his Judgment againſt a Purchaſer, he muſt prove expreſs Notice of the Judgment in the Purchaſer, or elſe ſhall never be relieved againſt the Purchaſer. And upon this Point the Plea was allowed; And as to the other Point, That the Cognizor being in Execution upon the Judgment, and ſo the Land not to be charged during his Life; it was ſtrongly inſiſted, That was no good Exception in Equity, for that the Bill was to diſcover Incumbrances, which the Plaintiff could not have after the Cognizor's Death. And it was poſitively affirm'd, that it had been ruled here, That a Bill will lie, notwithſtanding the Debtor was in Execution upon the Judgment. But this Point was not much debated; howbeit the Court inclined in Opinion, That this Part of the Plea was not good.

Purchaſer ſhall not be affected by a Judgment in Equity, without expreſs Notice of it before the Purchaſe. *Ant.* 34, 35. 1 *Vern.* 50, 51, 52.

Whether the Cognizee of a Judgment having the Cognizor in Execution, can bring a Bill whilſt he lives, to charge the Lands. See 1 *Vern.* 294, 313, 398, 399.

Williams *againſt* Arthur. November 24.

On a Plea and Demurrer.

A Decretal Order was produced in 1657. for ſeveral Matters; and then after the Cauſe had depended on Account three Years, a Decree was drawn, wherein the firſt Decretal Order was recited, but part of the Matter thereby decreed was omitted in the decretal Part of the Decree it ſelf; and ſoon after the Decree ſigned and inrolled, the Defendant died. A Scire Facias was ſued to revive, and in the Proſecution thereupon the Plaintiff diſcovered the Omiſſion, and ſo could not have the Benefit of that Part which was omitted in the Decree that way, and the Defendant being dead, could not help that Omiſſion by a Motion upon the Surprize. The Bill now was a Bill of Revivor to revive ſo much of the Decree as was omitted, as was alledged; howbeit in Truth the Bill was to the whole Decree.

It was pleaded, that the Decree being inrolled, a Bill of Revivor did not lie, but a Scire Facias. Ordered, That the Plea and Demurrer be over-ruled.

Part of the Matters being omitted in drawing up the Decree, a Bill of Revivor lieth to revive thoſe Matters.

Of Bills of Revivor, *vide Curſ. Canc.* The Tables to 1 and 2 *Vern.* Title *Abatement*, and *Poſt.* 152, 174.

Chief

Chief Juſtice Foſter.
The Maſter of the Rolls.

Merry *againſt* Abney *the Father, and* Abney *the Son, and* Kendal. November 26.

All which were heard on *Abney* the Son's Plea, about *Trin.* 12 *Car.* 2. and the ſame Cauſe heard this Day.

A. contracts with *B.* for Sale of Lands, but ſells them to *C. &c. ſans* Notice of the firſt Contract. *Vide Ant.* 34. *Poſt.* 39.

KENDAL contracted with the Plaintiff to ſell him certain Lands in Leiceſterſhire. Afterwards Abney the Father, who lived near the Lands, in Behalf of Abney the Son (a Merchant in London) purchaſeth thoſe Lands of Kendal, and had a Conveyance from Kendal to Abney the Son, and his Heirs. The Plaintiff's Bill was to be relieved upon his Contract with Kendal, and againſt the Conveyance to Abney, and charged Notice of his Contract to both the Abneys. Abney the Son pleads himſelf to be a Purchaſer bona fide, without any Notice of Kendal's Contract with the Plaintiff, and without any Truſt for his Father.

Notice to him that purchaſeth for another, ſhall affect the Purchaſer himſelf. *Vide Ant.* 34, 35.

The Court declared, That Notice to the Father in this Caſe was Notice to the Son, and ſhould affect the Son, who was the Purchaſer. So that Notice of a dormant Incumbrance to a Party that purchaſeth for another, ſhall affect the very Purchaſer. And accordingly was this Cauſe decreed, it appearing at the Hearing, that Abney the Father had Notice of Merry's Contract before he purchaſed for his Son.

The Maſter of the Rolls.

Seabourne *againſt* Blacſtone. November. 26.

Payment to the Wife, binds the Husband.

THE Wife received Money due on a Bond entred into by one to her Husband. She uſually received and paid Money: He got Judgment on the Bond. Ordered that he acknowledge Satisfaction thereupon.

Where Payment to one binds another, or not, ſee 1 *Vern.* 150. 2 *Salk. Ante* 33.

The

The Lord Chancellor.
Maſter of the Rolls.

Davie *againſt* Beardſham *and his Wife.*

DAVIE agrees for the Purchaſe of certain Copyhold Lands, which were ſurrendred out of Court to his Uſe; but before Admittance he dies, having other Copyholds, and having made his Will after the ſaid Contract, and thereby deviſed to the Plaintiff (who was then, and at his Death, his viſible Heir) all his Copyholds after his Death; his Wife being priviment enſeint at his Death, is delivered of the Defendant's Wife, who then becomes the Heir of the Deviſor. The Plaintiff taking it for granted that the Copyholds ſo contracted for, did not paſs by the Will, ſuffered the Heir to be admitted thereunto, and held the ſame of the Heir for twenty Years, and paid her Rent for that Time, and had agreed ſo to do as long as he ſhould hold them. Afterwards Differences ariſing between the Heir and him about other Matters, the Plaintiff exhibited his Bill (inter alia) to have thoſe Copyhold Lands decreed him. And it was declared upon the Hearing by the Court, That it was clear the ſaid Copyholds ſo agreed for did paſs by the Will to the Plaintiff, for that the Purchaſer had an Equity to recover the Land, and the Vendor ſtood truſted for the Purchaſer, and as he ſhould appoint, 'till a Conveyance executed. And the Caſe of the Lady Fohaine, about 1657. was cited, where it was ruled, That if upon Articles for a Purchaſe, the Purchaſer dieth, and deviſeth the Land before the Conveyance executed, the Land paſſeth in Equity. But in the principal Caſe, inaſmuch as the Plaintiff had admitted the Title to be in the Heir, and paid her Rent, and agreed ſo to do, the Court would not decree it; but declared, if the Plaintiff had come in Time, it was proper to be decreed.

Lands contracted for, paſs by Deviſe of the Purchaſer. *Vide Poſt.* 47. *Hard.* 160, 216. 2 *Vent.* 361. 2 *Chanc. Caſes* 161. *Ant.* 34.

Vendor after Contract to purchaſe, ſtands truſted for Vendee.

Jones *againſt* Done.

IN which Caſe a Decree was made, whereby it was decreed, That an Office was extendible in Law or Equity.

An Office extendible.

What is extendible, &c. 1 *Vern.* 50, 468, 9. 2 *Vern.* 390, 426.

Biſhop

Biſhop *againſt* Biſhop.

Rep. Chanc. Part 1. 142. Award.

AN Award confirmed in Part, and made void in Part.

What Awards are good or void, *vide Poſt.* 87, 185, 6, 279, &c. 1 *Vern.* 157, 8, 9. 2 *Vern.* 100, 109, 251, 380, 444, 485, 514, &c. 705.

The Lord Chancellor. Maſter of the Rolls.

Guilbert *againſt* Hawles. 12 & 17 Feb. 14 Car. 2.

THE Bill was to be relieved againſt an Action for Rent, and at the hearing of the Cauſe it was decreed to account, and that the Plaintiff ſhould pay what was due to the Defendant on Account. The Account was ſtated by a Maſter; then the Plaintiff moved to diſmiſs his Bill, paying what Coſts the Court would aſſeſs; which was oppoſed, for that the Judgment of the Court being given, the Plaintiff ought not to abuſe the Court and depart from it; and the Caſe of Wingfield and Thomas was cited, whereby upon an Obligation the Plaintiff here was decreed to pay Principal, Damages, and Uſe; and afterwards the Plaintiff there would have diſmiſs'd his Bill, but it was deny'd.

After a Decree the Plaintiff may not diſmiſs his Bill. Of Diſmiſſions, ſee 2 *Vern.* 32. *Curſ. Canc.* 153, 210, 320, 340 to 351.

Churchil inſiſted, That Quilibet poteſt renunciare juri pro ſe introducto.

The Maſter of the Rolls directed it to be moved before the Chancellor, and 17 Feb. it being moved before him, it was deny'd. And the ſaid Chancellor and Judge Brown in 17 Car. 2. between Cheatly and Packington, gave the like Rule in the ſame Caſe.

Edgworth *againſt* Davies. 1 July, 14 Car. 2.

Upon a PLEA.

Plea to the Juriſdiction, that the Lands lay in *Cheſhire*, &c. See *Curſ. Canc.* 181 to 185, 191 to 196. 1 *Vern.* 131, 212. 2 *Vern.* 484, 494. 1 *Chanc. R.* 86, 140, 278.

THE Bill was to have an Account of the Profits of Land, which the Defendant had received on Truſt for the Plaintiff during his Minority, and for Monies receiv'd upon Bonds belonging to the Plaintiff, and for Writings, &c. The Defendant pleaded, That the Lands lay in Cheſhire, and that the Defendant lived in Cheſhire, in the

County Palatine of Cheſhire and Lancaſhire, and therefore not within the Juriſdiction of this Court. This Plea having been formerly argued before Judges in Abſence of the Chancellor, they ordered Precedents to be produced, which were as follows: Hern againſt Smith, 12 Eliz. for that the Lands lay within the Dutchy, was over-ruled. Sherborn againſt Vaughan, 13 May, 14 Car. The Bill was to be relieved on Truſt; the Defendant pleaded the Juriſdiction of the Dutchy; this was ex parte. But in my Lord Coventry's Time, Hales againſt Daniel, 24 Octob. Car. 1. ad idem; in which Caſe, the Thing being for a Perſonal Eſtate, the Court over-ruled the Plea of the County Palatine; and in the ſame Cauſe, Mr. Page, to whom it was referred to certify, reported upon the View of Precedents, That the Juriſdiction of the Counties Palatine was allowable between Parties dwelling in the ſame County, and for Lands there, and for Matters local. And in the Argument of the principal Caſe was cited the Caſe of Sir John Egerton and the Earl of Darby; and upon long Debate in the principal Caſe, the Plea was over-ruled, but without Coſts.

Over-ruled without Coſts.

The Lord Chancellor.
Baron Turner.

Clark *againſt the Lord* Angier. 3 July, 14 Car. 2.

Upon a Demurrer.

A Legacy being given to a Feme Covert, who was Covert when the Legacy was given; the Husband of the Wife, without her, exhibits a Bill for it, becauſe the Wife was no Party. The Defendant demurred, for of Things meerly in Action belonging to the Wife, as a Bond, &c. ſhe ought to join in Suit; but otherwiſe it is of a Rent running in the Wife's Right after Marriage. If the Husband alone ſhould ſue the Bond, and be nonſuited or diſmiſſed, that will not conclude the Caſe; but if he die before Judgment or Decree, the Wife cannot revive the Suit.

Where a Feme Covert ought to join in a Title, Suit, &c. and where not.
Vide Ant. 27, 35. 2 *Vern.* 401, 626.

Parker *againſt* Palmer.

Upon an Appeal from a Decree at the *Rolls*. 27 January, 14 Car. 2.

Agreement, tho' the Conſiderations be unequal, decreed.

PARKER ſold a Leaſe which he had from the Dean and Chapter for three Lives, to Palmer, &c. And it was agreed Palmer ſhould pay 4320 l. for it. After the Defendant agreed with the Plaintiff, that if he would abate him 420 l. he would re-convey the Leaſe whenever the King and Dean and Chapter were reſtored. The Plaintiff thereupon abated the 420 l. and the King and Church being now reſtored, the Plaintiff exhibited his Bill for the Leaſe, which the Maſter of the Rolls decreed to him.

Note, That this was decreed againſt the Son of the Purchaſer, the Father being dead.

The Queſtion was, Whether he came in by Settlement, or as an Occupant?

But if no Conſideration be, 'tis *nadum pactum*, and void. *Ant.* 2.

Upon Appeal to this Decree, it was affirmed by the Lord Chancellor and Bridgman. And in this Caſe it was objected, That this Court ought not to decree that, for 'twas but in the Nature of a Wager, and the Conſideration unequal and penal; and that an Action more properly lay; and that it was at the Diſcretion of the Court to decree an Agreement, or not, when it ought to be performed ex debito Juſtitiæ. Yet it was decreed ut ſupra.

And note; unreaſonable Agreements have been ſet aſide in Equity, as 2 *Vern.* 186. So of underhand Agreements. 1 *Vern.* 240, 348, 346, 475. 2 *Vern.* 71.—602, 627.

The Lord Chancellor.

Savil *againſt* Darcey.

1 *Rolls Abr.* 382. Z. *Pl.* 1.

Money decreed by Rule of Court to be paid before a Bill of Review; but upon giving Security to pay it, the Rule diſpens'd with. *Vide Ant.* pag. 3. *in pede*, and *Poſt.* 43, 44, 45, 61, 63, *&c.*

A Decree was obtained for a great Sum of Money: A Bill of Review was brought, and new Matter aſſigned. The Rule of Court was pleaded, That the Defendant ought firſt to pay the Money before the Bill ſhould be brought into Court. Let him give good Security for the Money, and we will diſpenſe with the Rule. The like Caſe between Baſton and Biron, by Order of the Houſe of Peers, about 1662.

DE
Term. Sanct. Hill.

Anno Regis 15 & 16 Car. II.

IN
CANCELLARIA.

The Maſter of the Rolls.

Curteſs *againſt* Smalridge. January 26.

THE Defendant's Wife had pawn'd her Husband's Plate to the Plaintiff for 110l. The Defendant in Trover for this recovered 115l. Damages againſt the Plaintiff, and Judgment for it. A Bill was to be relieved againſt this Judgment, for that the Defendant was privy to the Pawning, and had the 110l. And the Proofs being read, it appeared that the Defendant had confeſſed ſo much; which if it had been proved at the Trial, it was agreed the Defendant could not have recovered in the Trover; and there being no Proof now, that the Defendant at Law could not by Reaſon of any Accident have his Witneſſes at the Trial, the Court would not on any Neglect of his grant a new Trial.

A Wife pawns her Husband's Plate, who recovers in Trover, and tho' done with his Privity, yet deny'd Relief; ſee the Caſe 1 *Vern.* 407.

And it was inſiſted upon as a Rule, That nothing ſhall be a Ground to direct a new Trial to avoid a Judgment at Law, that would not be Ground for a Bill of Review to reverſe a Decree; and a Confeſſion ſubſequent to a Decree, no Ground for a Bill of Review. Nor is the want of any Evidence or Matter which might have been uſed in the firſt Cauſe,

Rule or Maxim: *Nothing a Ground for a new Trial after Judgment, that is not Ground for a Bill of Review.* *Vide Ant.* 3, 42.

and of which the Party had then Knowledge, any Ground for a Bill of Review: And here is no Proof but that the Plaintiff might have had the Witnesses that were examined here at the Trial; and so this Cause was dismiss'd.

Post. 45. with the Notes thereupon.

See also *Ant.* 2, 3. and *Post.* 61, 62, 63. of Original Bills in Nature of Bills of Review.

The Lord Chancellor.
Baron Turner.

Read *against* Hambey. Febr. 18.

On a Demurrer.

Original Bill in Nature of Review, where it lies not to explain a Decree, &c.
Vide Ant. 2, 3. *Post.* 61, 63. and Notes. *ibid.*

THE Bill was to explain a Decree, wherein the Case was, One seized of the Manor of Wrangle, worth near about 110l. per Annum, and another of a Farm in Wrangle held of the same Manor, worth 250l. per Ann. and the Fee of both came after into one Person's Hands, he having articled to settle the Manor of Wrangle, worth 110l. per Ann. with the Improvements. It was on the Articles decreed, his Heir should convey the Manor of Wrangle, with all the Improvements, to the Plaintiff in the first Suit; and if the Manor was not worth 110l. per Ann. it should be made up out of the other Lands. By this Decree and Unity of Possession of the Manor and Farm, the Plaintiff claimed all the Manor and Farm; and the Bill being to explain the Decree, charged the Farm to be worth 250l. per Ann. and the Manor 110l. per Ann. and therefore desired to have the Decree explained, Whether the Decree intended All, or only the Manor, according to the Articles? The Demurrer was, For that it was an Original Bill, and sought to alter or change the Decree.

Bill of Review will not lie upon a Fact not formerly in Issue.

For the Plaintiff it was insisted, That the Plaintiff was without any Possibility of Help but by this Bill; for that it being to be relieved upon a Fact not in Issue, nor appearing in the former Cause, a Bill of Review would not lie for it; and that the Defendant by having demurred, had admitted the Bill to be true; and then the Case was, That the Lands claimed without the Decree, were worth 400l. per Ann. whereas the Articles on which the Decree was founded, were but for 110l. per Ann. and therefore it was strongly urged that they ought to answer.

For the Defendant it was replied, That no Original Bill ought to explain a Decree upon any Matter precedent to the Decree; and the Conſequence of that was alledged to be dangerous, for it would be introductive of a Means to blemiſh and hinder the Execution of a Decree. And as to the Hardſhip of the Decree, or the Intent of it, it was inſiſted, That that would be fit for Determination upon an Execution for Non-performance, where the Defendant might ſet forth what he had to ſay for his Excuſe, and then it would be proper for the Court to declare what was the Intent of the Decree, and that the Juſtice or the Injuſtice of the Decree might then be determined. And of this Opinion the Court ſeemed to be. But the Plaintiff's Counſel inſiſting, That the Defendant would be bound in a Proſecution on the Decree by the Letter of it, and could not then put any Interpretation on it againſt the Letter of it, they therefore pray'd Leave of the Court to ſet forth the Special Matter on Examination; which the Court would not give an Order for. And as to the Plaintiff's Objection, That the Demurrer admitted the Bill, and ſo ought to have an Anſwer, becauſe the Manor and Lands were of the Value ut ſupra, it was anſwered by the Defendant's Counſel, Alligari non debuit, quod probatum non relevat; and the Demurrer was allowed. Then the Plaintiff's Counſel pray'd the ſigning and inrolling of the Diſmiſſion on the Demurrer might be ſtay'd 'till the Plaintiff was examined on Interrogatories for Breach of the Decree, &c. But the Court deny'd it.

Original Bill not to be admitted to explain a Decree upon a Fact precedent.

2 *Bulſtr.* 197, 215. 3 *Bulſtr.* 118. *Cro. Jac.* 336. 1 *Roll. Rep.* 331. 4 *Inſt.* 85. 1 *Roll. Abr.* 382. Z. *Pl.* 3, 4. *Lane* 68, 69. *Ant.* 2, 3, 43, 44. *Poſt.* 54, 61, 63.

Demurrer on the Rule. *Non debet alligari quod probatum non relevat. Poſt.* 77.

For Rules and Caſes touching *Demurrers* in Equity, *vide Curſ. Canc.* 174 to 235. *Poſt.* 56, 77. 2 *Chanc. R.* 68. 3 *Chanc. R.* 15, 82, 56, 76.

1 *Vern.* 78, 90, 107, 165, 282, 416, 463. 2 *Vern.* 380.

And note; where the Defendant demurs to a Bill or Replication for Cauſe, he may aſſign another Cauſe at the Bar, paying Coſts. But if ſuch Demurrer is over-ruled, he muſt pay double Coſts. 1 *Vern.* 78.

DE

DE
Termino Paſchæ.
Anno Regis 16 Car. II.
IN
CANCELLARIA.

Bawtrey *and his Wife againſt* Ibſon. May 4.

A Releaſe ſet aſide by a ſubſequent Accident, having Relation to the Original Equity, not intended to be releaſed.
Vide Ant. 11, 15.
Poſt. 47, 48.
2 *Vern.* 186, *&c.*

WILLIAM IBSON being poſſeſſed of a Term for Years from the Vicars Choral of York, aſſigned the ſame to Truſtees, and then buys the Inheritance from the Truſtees for Sale of Church Land: And before Marriage, covenants to ſtand ſeized to the Uſe of himſelf, and Wife, for Life, for a Joynture.

In 1659. William Ibſon died, having made his Will. After his Death, his Relict entred and held the Lands; and then, upon Agreement with his Executors for Money paid, releaſed to them the Perſonal Eſtate of the Teſtator, and all Demands for the ſame. Soon after, the King being reſtored, the Title of the Inheritance under the ſaid Purchaſe became void. The Widow married the Plaintiff, and they two brought their Bill againſt the Executors of William Ibſon, and the Aſſignees and Truſtees of the Leaſe; and it was to the End, that though the Inheritance was evicted, they might hold for ſo long of the Term as the Joyntureſs ſhould live; and that the Releaſe might not bar her of that, becauſe not intended when the Releaſe was given; nor was the Leaſe then looked on as Part of the Perſonal Eſtate.

1 Queſt. was, Whether the Inheritance being gone, the Leaſe which was to attend it, ſhould go now, according to the Uſe in the Covenant to ſtand ſeized?

A Leaſe, tho' attending the Inheritance, decreed to the Wife.

Reſolved in this Caſe, It being a Settlement in Marriage, and ſo on a Conſideration, it ſhould go to the Wife for ſo many Years as ſhe lived. But it was ſaid, it would have been another Caſe between the Heir and Executor of the Covenantees.

Note; the Wife was a Purchaſer, and Leaſes are Aſſets, &c. *Ant.* 18. *Poſt.* 87.

2 Queſt. If the Releaſe of the Demands to the Perſonal Eſtate ſhould bar the Feme of the Benefit of the Term?

A. ſeized of a Term for Years, purchaſes the Fee, and then ſettles on his Wife for Jointure, and dies; The Wife releaſes to the Executors all her Right to the Perſonal Eſtate, and afterwards the Fee is evicted, and notwithſtanding the Releaſe, the Wife decreed to hold during the Term. *Vide Ant.* 39.

And it appearing by the Proof, that the Agreement which begot the Releaſe, was before the Title to the Inheritance was avoided, and concerning that which was then look'd upon as perſonal Eſtate, and not touching the Leaſe; and that notwithſtanding the Releaſe, the Feme continued the Poſſeſſion: It was reſolved the Releaſe ſhould not bar or prejudice the Plaintiff's Title in Right to the Leaſe. And it was decreed, That the Plaintiff ſhould hold for ſo many Years as ſhe lived; and that if the Leaſe were renewed, ſhe paying proportionably to her Eſtate for Life, that the Joyntureſs ſhould hold for ſo many Years as ſhe lived, and then to go to the Executors.

The Lord Chancellor.
Judge Brown.
The Maſter of the Rolls.

Kinaſton *againſt* Maynwearing. May 4.

Equity raiſed out of a Deed not proved. *Vide Ant.* 11, 15, 46.

The Plaintiffs were the Children of the Defendant's Siſter; and the Defendant's Mother, during his Minority, as his Guardian, managed his Eſtate. And as to the Lands in queſtion, it was pretended thoſe were ſettled by the Defendant's Father on the Plaintiffs Mother, being the Defendant's Siſter; and the Defendant's Mother and Guardian for about two Years before the Plaintiffs Mother's Marriage, put her into Poſſeſſion of thoſe Lands, and

and upon her Marriage, articled that thoſe Lands ſhould be ſettled on her and her Heirs; and to thoſe Articles the Defendant, then an Infant, was a Witneſs. Upon this Matter (tho' there was no Proof of the Deed whereby it was pretended the Defendant's Father ſettled the Lands upon the Plaintiff's Mother) the Court decreed againſt the Defendant, upon Colour of Equity for want of the Deed, and yet there was no Proof of a Deed, which was conceived very hard, for the Court to raiſe an Equity out of a Deed when it was not proved.

Equity raiſed out of a Deed which was not proved, a hard Eqnity.

Vide 2 *Vern.* 561. *Ant.* 11.

The Lord Chancellor.
Maſter of the Rolls.

Thirveton *againſt* Collier. May 11.

Agreement to incloſe Common, Parties that have Intereſt in the Common, and not Privy to the Agreement, ſhall not be bound.

Hard. 131, 183, 333, 22, 118, 104. 2 *Vent.* 348. 2 *Chanc. Caſes* 29. *Vide Poſt.* 85. *Ant.* 21, 42, & *infra.*

THE Bill was, to have a Decree for an Incloſure upon an Agreement. It appeared by the Bill, That there were to be eighteen Allotments, and there were but fifteen Parties to the Suit; And ſo it was objected by the Defendants, That all the Parties to the Agreement were not Parties to the Suit; and alſo that there were other Perſons that claimed Common on the Ground to be incloſed, that were not Parties either to the Agreement or Suit; and ſo to decree that Agreement, would be to do a manifeſt Wrong, and be an Occaſion of Suits and Quarrels.

Whereunto it was anſwered by the Plaintiffs, That tho' there were eighteen Shares, ſome of the Perſons were to have two Shares, ſo as that made up the eighteen; and that there were others had Common but by Vicinage: But nothing of this appeared to be alledged by the Plaintiffs.

It was decreed nevertheleſs, That the Agreement for the Incloſure ſhould be perform'd, and a Commiſſion was awarded to ſet out each Perſon's Title. And the Court decreed, That if there were any that had Intereſt, and were not Parties to the Agreement, they could not be bound, and ſo at no Prejudice; but however, it ſhould not be in the Power of one or two wilful Perſons to oppoſe a Publick Good.

See 2 *Vern.* 103. An Agreement for *Stinting Common* between the Lord and Tenants, Decreed to be performed, tho' oppoſed by a few humourſome Tenants. For ſuch Agreements are more favoured here, than Agreements to incloſe Common. *Qr. ibid.* 301, 356, 575.

And note; the Remedy on an Agreement ought to be reciprocal. *Poſt.* 209, 202, 302.

The

The Lord Chancellor.
The Maſter of the Rolls.
Juſtice Windham.

Goodrick *againſt* Brown. May 11.

1. RESOLVED, That whereas by a Decree of this Court a Fine was levied to a particular End and Purpoſe, which would operate farther in point of Law, than to that End which the Decree ordered it, That ſuch Fine ſhould not be ſuffered in Equity to work farther than the Decree intended.

Fines purſuant to a Decree ſhall work only according to the Decree. See 2 Vern. 56, 189, 368, 662.

2. That the Fine or Recovery of a Ceſtui que Truſt ſhould bar and transfer the Truſt, as it ſhould an Eſtate at Law, if it were upon a Conſideration: But otherwiſe Juſtice Windham doubted of it; for he ſaid he look'd upon this Court as remedial to thoſe that come in upon a Conſideration, &c.

Fine and Recovery ſhall work on a Truſt as on an Eſtate at Law. *Vide infra.*

Equity only remediable to thoſe that come in upon Conſideration. Ant. 34. Poſt. 78, 99.

3. That whereas the Perſon that ſuffered the Recovery was Tenant for Life, in point of Law, and there had been an Agreement precedent to the Recovery, by the Anceſtor that was dead, for the ſettling of the Premiſſes, ſo as to have made the Tenant for Life Tenant in Tail, That the Recovery ſhould be good in Equity, and ſhould work upon the Agreement.

Againſt which it was objected, that the Recovery was a wilful Forfeiture in point of Law, and was voluntary, and no Conſideration; and ſo the Truth appeared, That the Defendant was as near in Blood to the firſt Anceſtor as the Plaintiff; and if this Court would maintain a voluntary Recovery of a Truſt raiſed upon a Conveyance, there was not ſo much in this Caſe; for here was but an Agreement, and though that Agreement might upon a Bill have been decreed, yet there being never any ſuch Bill, the Recovery ought not to be ſupported. As to this Point and the ſecond, the Judge would not deliver any Opinion; but the Court decreed it.

A wilful Forfeiture by ſuffering a Recovery in point of Law, ſupplied and holden in Equity. 1 *Vern.* 60, 84, 149, 484. 2 *Vern.* 56, 368, 662.

See 1 *Vern.* 60. 84, 132, 149, *&c.* That a Fine and Non-claim by a Truſtee, or where there is Notice of a Truſt, will not bar it. *Poſt.* 191. *contra*, if levied by *Ceſtuyque Truſt* in Tail, *&c. ibid.* 149, 226, 440.

At the Rolls. The Maſter of the Rolls.

Scot *againſt* Rayner. May 11.

Iſſue, whether a Preſon, to whom another had got Adminiſtration, was dead or not.

THE Defendant had ſued the Plaintiff at Law on a ſingle Bond entred into by the Plaintiff to the Defendant's Husband, the Defendant ſuing there as Adminiſtratrix to her late Husband. The Bill here was, That in truth the Defendant's Husband was not dead, and there appearing ſome probable Evidence that he was not dead, but concealed himſelf, and the Defendant pending this Suit, having got Judgment againſt the Plaintiff, the Court awarded an Injunction to ſtay Execution, and directed a Trial at Law to be, Whether the Defendant's Husband was dead or not.

Of Iſſues and Trials at Law directed out of Chancery, *vide Curſ. Canc.* 342, 390, 447. 1 *Vern.* 176, 293, 295, 316, 267, 439. 2 *Vern.* 75, 232, 240, 378, 419, 437, 503, 555.

The Lord Chancellor.

Judge Brown.

Wan *againſt* Lake. May 12.

On a Demurrer.

Poſt. 56.

THE Demurrer was to a Subpœna in Nature of a *Scire fac'.* and it was becauſe he that brought the Subpœna did not thereby alledge himſelf to be Heir or Executor to him that had the Decree.

A *Subpœna* no Record, nor ought to be demurred unto. *Curſ. Canc.* 211. Of *Subpœnas, vide* 2 *Vern.* 569. 1 *Vern.* 172. *Curſ. Canc.* 6, 25, 64 to 79, 259, 260, *&c.*

Reſolved, That there never was any Demurrer of this Nature before: And the Subpœna was no Record, nor any where filed, and ſo not to be demurred to: But the Cauſe was to be ſhewed upon the Return of the Writ on the Order, and the Order did mention him that brought the Writ to be both Heir and Executor. So this Demurrer was conceived very ridiculous, and over-ruled.

The Lord Chancellor.
Judge Brown.

Freak *againſt* Hearſey. May 12.

On a Demurrer.

THE heir of the Mortgagee exhibited a Bill to have the Mortgagor pay the Money, or to be decreed to make further Aſſurance, and be foreclosed of Redemption. The Demurrer was, becauſe the Executor of the Mortgagee, who might have a Title to the Mortgage-Money, was no Party; and the Demurrer was allowed.

Executor of the Mortgagee ought to be a Party where the Heir ſues to have the Money paid, or the Mortgage foreclosed.

Vide poſt. 74, 77, *&c.* who are to be made Parties.

In Court. The Maſter of the Rolls.

Glover *againſt* Portington. May 14.

JOSS GLOVER (the Plaintiff's Father) for ſecuring 50 l. per Ann. to Anne his Mother-in-law, for Life, in lieu of 50 l. per Ann. which ſhe had chargeable on other Lands of his which he was about to ſell, 11 May, 13 Car. 1. ſurrenders certain Copyhold-Lands (of Gavelkind) to Thomas Roll (Brother of Anne) and his Heirs, in Truſt for Anne, upon Condition, that if Joſs Glover, his Heirs or Aſſigns, paid Anne 50 l. per Ann. during Life, the Surrender to be void. Thomas Roll was admitted; Joſs Glover failing to pay the 50 l. per Ann. 4 July, 20 Car. 1. Thomas Roll ſurrendred the Premiſſes to the Uſe of Anne for Life, the Reverſion to himſelf and his Heirs (but in Truſt for her and her Heirs,) She was admitted: Thomas Roll died, the Premiſſes deſcended to his Children and Grandchildren, ſome whereof yet Infants, and one a Lunatick. 22 Jan. 1651. Anne by Will directed that the Arrears of the 50 l. per Ann. ſhould be paid to her Executor (which the Defendant Portington is) to ſuch Purpoſe as therein is expreſſed, and declared

Mortgagee remits by Will Part of the Mortgage-money and all the Intereſt, if the reſt be paid in three Years. The Mortgagor failing to pay within 3 Years, loſes the Benefit of the Bequeſt. *Poſt.* 61.

Of Conditions annex'd to Deviſes, *&c. vide ant.* 22. *poſt.* 90. 1 *Vern.* 20, 222, 270. 2 *Vern.* 222, 359, 478, 560, 561, 721.

declared that her Nephews, the Sons and Grandchildren of Thomas Roll, ſhould permit her Executors to receive the Rents and Profits towards Payment of Legacies, and appoint her ſaid Nephew and Grandchildren, that if the Plaintiff (being Heir of Joſs Glover) ſhould within three Years after her Death, pay her Executor all Arrears of the 50 l. per Ann. that they ſhould ſurrender to the Plaintiff and his Heirs, and remit the Plaintiff 100 l. thereof, and the Intereſt of the whole, ſo as he paid the Arrears in three Years; and declared, that if the Plaintiff failed to pay the Arrears in three Years, the Premiſſes ſhould be ſurrendred to her Executor; and the Arrears being paid, ſhe wills her Executor to pay the Overplus to the Plaintiff, and to ſurrender to him. And in July 1654. Anne died, and in February next following the Bill was exhibited to have a Diſcovery of what was paid, and that paying all Arrears but the 100 l. and Intereſt, he might have a Surrender from Rolls, who claimed the Eſtate to their own Uſe. This Cauſe was, through Infancy of the Defendant, ſo delayed, that their Anſwers could not be gotten, and through Abſence of the Plaintiff out of England, which was nigh ten Years; and now it was decreed, That if the Plaintiff would redeem, he ſhould pay all the Arrears and Intereſt.

Serjeant Fountain drew a Petition to the Maſter of the Rolls to re-hear it on the Point of Intereſt, and afterwards moved it in Court; and the Lord Keeper (the Maſter of the Rolls being preſent) recommended it to him to re-hear it; and as to the Point of the 100 l. of the Principal, which was to be abated by Will, the Bill came within ſix Months after the Death of Anne, and it was not ſafe to go to hearing without the Truſtes, whereby to have a Surrender, and they were in Infancy and Lunatick, which was the principal Reaſon the Cauſe depended ſo long.

Serjeant Fountain did, upon a Diſcourſe between him and A. B. agree it was againſt the Plaintiff as to the 100 l. (tho' Churchil was clear of another Opinion) for Serjeant Fountain ſaid, That it being a voluntary conditional Gift, the Plaintiff ought, if he would have the Benefit of it, to have performed it by Payment within three Years, and ſought a Re-conveyance after: But as to the Matter of the Intereſt, that was ſtronger; for that the Will appointed that the Arrears being paid, the Land ſhould be ſurrendred to the Plaintiff; and it was ſaid, the Teſtator intended a Benefit to the Plaintiff by the Appointment; and if he ſhould pay

See 1 *Vern.* 210, 456. *Max. Eq.* 59, 60.

the Arrears and Intereſt, it was no Benefit, for then the Premiſſes without ſuch Appointment ought to be ſurrendred to the Plaintiff, for the ſame were not forfeited above ten Years when the Bill was exhibited.

The Maſter of the Rolls, upon the Re-hearing, 25 June, Car. 2. confirmed the firſt Decree. Serjeant Fountain, Maſter Churchil and Maſter Keck for the Plaintiff. Maſter Sollicitor Finch, and divers others, for the Defendants. And afterwards there was a Bill of Review to reverſe this Decree; to which Portington demurred, and inſiſted there was no Error in the Decree. And this Demurrer was argued in Trinity-Term, 1665. before the Lord Chancellor and Baron Rainsford. And in the Debate, it was inſiſted by the Defendant's Counſel, That this was a Bill of Review of a ſtrange Nature; for that the Plaintiff, who had the Decree, did by his Bill of Review complain, that he had not enough decreed; whereas if a Review lies, it lies only for him againſt whom the Decree or Diſmiſſion is. After long Debate, the Demurrer was over-ruled.

Bill of Review by him for whom the Decree was. *Vide ant.* 42, 43, 44. *poſt.* 55.

The Caſe *ſupra* being on a Deviſe with a Condition or Limitation annex'd, it is apparent both in Law and Equity, the Deviſee muſt perform the Condition if he will have any Benefit of the Deviſe, acording to that general Maxim, *He that will have Equity, muſt do Equity.*

But out of this general Rule are to be excepted:

1. Such Conditions as are repugnant to the Law of God, of Reaſon, or the Common Law.
2. Such as are repugnant or contrary to the Eſſence of the Grant, *&c.*
3. Such as are only added *in terrorem*, in Reſtraint of Marriage, *&c.* See 1 *Vern.* 20.
4. Where the Condition becomes impoſſible by the Act of God, *&c.* 2 *Vern.* 721.
5. Where there is Fraud or Practice in him who claims Benefit by the Breach. 2 *Vern.* 344.
6. In all Caſes that lie in Compenſation, the Time for Performance may be enlarged, though in the Caſe of a Condition precedent. 2 *Vern.* 1, 222. *Vide* 1 *Vern.* 83, 167, 223, 270, *&c.*
7. 'Tis alſo ſufficient if the Intent of it be performed, though not ſtrictly in the Words thereof. 1 *Vern.* 83.

Of Truſts on Condition, *vide ant.* 22. *poſt.* 58, 90, 141, 191.

DE

DE
Term. Sanct. Trin.
Anno Regis 16 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
Baron Rainsford.

Combs *againſt* Proud. June 16.

THE Bill was a Bill of Review; and in drawing up the Decretal Order, the Matter upon which the Decree was made was declared to be proved, and the Caſe ſtated far different from the Fact.

The Errors aſſigned by the Bill were, That the Decree was grounded on Matters not proved, and inſtanced in Particulars, and that the Matters mentioned in the Decree to be proved were not proved, &c. The Demurrer was general, That the Decree contained no Error in Law, and that the Matters alledged for Error were but Miſ-judgment. And upon Debate it was declared, That upon a Bill of Review, the Cauſes for Review muſt ariſe and appear upon the Caſe as it is ſtated in the Fact; and that the Fact muſt be admitted as it is there ſtated; and that touching where the Fact is miſtaken, upon which the Court grounded their Judgment, it is proper in ſuch Caſe for that Reaſon to have the Cauſe re-heard before the Decree be enrolled: Yet after the Decree enrolled, that is no Ground for a Bill of Review;

Maters aſſigned for Errors in a Decree muſt appear in the Decree it ſelf, for being of Record, muſt be tried by it. If the Fact be miſtaken at the Hearing and Decretal Order, that muſt be rectified by re-hearing, and not otherwiſe.
Vide poſt. 64. *ant.* 3. 1 *Vern.* 57, 131, 293, 310.
2 *Vern.* 91, 142.

view; for the Decree inrolled is Matter of Record, and can be tried by the Record it self after it is inrolled, and must be taken to be true; and so the Demurrer was allowed.

Lane 69. *Hard.* 51. 1 *Roll. Abr.* 382. Z. *Pl.* 2. *Lane* 70. *Ant.* 45.

The Original Case of *Comb* and *Proud* was as follows. It was heard at the *Rolls* in *November* last.

The Original Bill was to be relieved against an Account stated between the Mortgagor and the Heir of the Mortgagee, under Hand and Seal, upon Suggestion, That it was agreed upon the Sealing, that if there were any Mistake in the Account, the same should be reviewed and rectified. The Defendant denied the Agreement, and pleaded the Account stated, and three Meetings in order to it, and the same perused first by the Plaintiff, and affirmed on his Behalf, and then fully consented to and sealed. Issue was taken on the Plea, and the Plea was proved: Yet it appearing to the Court by the quantum of the same, that the Account was made up of Interest upon Interest, and the Court taking the Agreement to be proved, (howbeit it was not) decreed the Account stated to be set aside, and the Parties to go to account ab origine.

Original Bill; *post.* 64.

An Account stated set aside. *Vide post.* 262, 299.

Observe; The Reason why the Review did not lie, was, because, as the Decree was drawn up, there was no Error appeared in it.

Bill of Review. *Ant.* 53.

The Lord Chancellor.
The Master of the Rolls.

Bolton *against* Arme. June 17.

A Lessee of the Crown made an Under-lease of a Rent; during the Usurpation the State voided the first Lessee's Estate, and exposed the Crown Interest to Sale. The Under-Lessee applies to his Lessor for Protection; he bids him shift for himself; thereupon the Under-Lessee pays his Rent to the Purchaser from the State for some Time, and after the Under-Lessee purchases his Tenement from him that purchased of the State. Upon the King's Restauration, the first Lessee brings Debt against his Under-Lessee for the Arrears of Rent from the Time he discontinued Payment to him, and had Judgment by Default. The Under-Lessee prayed to

A Judgment for a Matter discharged by Act of *Oblivion*, decreed to be vacated. 3 *Chan. R.* 16, 19. *Vide post.* 59. 1 *Vern.* 294, 399. 2 *Vern.* 39, 160, 540, 711.

to be relieved againſt this Judgment, which was by the Bill alledged to be by Surpriſe, though no Surpriſe appeared in obtaining the Judgment. Decreed, that the Judgment be vacated, for that the Rent was diſcharged by the Act of Oblivion; Of which, the Lord Chancellor ſaid, a Court of Equity was as proper a Judge or Interpreter as the Judge at Law.

Court of Equity a proper Interpreter of a Statute. Vide poſt. 158.
1 Vern. 73, 213, 214, 256, 456.
2 Vern. 58, 431, 711, &c.

Where the Chancery cannot relieve againſt an Act of Parliament. *Poſt.* 228. *Vide* 3 *Chanc. R.* 220.

Williams *againſt* Owen *and* Arthur. June 24.

On a Demurrer to an Anſwer.

Whether a Demurrer may be to an Anſwer? *Vide ant.* 50.
Curſ. Canc. Tit. *Demurrers.*

THE Defendant having anſwered the Bill of Reviver, which ſought to revive the Order on hearing, as to ſo much as was not within the Decree inrolled, had by his Anſwer ſet forth Matter that tended to draw into Queſtion and new Examination an Agreement which was contained within the Decree as it was inrolled, and thereby fully ſettled. Therefore to ſo much of the Anſwer as tended again to draw into Examination the Matters ſettled by the Decree inrolled, or by the Order on hearing, the Plaintiff did demur, for that it would be of evil Conſequence, and introductive of Perjury, to permit a Re-examination of any of thoſe Matters. Upon Debate of this Demurrer, which was drawn by Serjeant Fountain, it was averred by the Defendant's Counſel, That a Demurrer to an Anſwer was never known before in a Court of Equity (though Serjeant Glyn for the Plaintiff affirm'd he had known of a Demurrer to an Anſwer before.) And tho' it did ſeem unreaſonable to the Court that a Defendant ſhould by Anſwer draw again into Examination the Matters formerly examined unto and ſettled, yet the Court doubted what to do as to the Demurrer. Some at the Bar ſaid, The Court ſhould have been moved in this Special Caſe for an Order to reſtain an Examination of all Matters formerly examined and ſettled. And it was now ordered that there ſhould be no Matters re-examined, that were examined to before. This, I take it, was the Rule that was given; tamen quære.

Examination after a Decree, &c. 2 *Vern.* 197, 409.

Of Examinations after Publication, &c. *vide* 1 *Vern.* 253, 254. 2 *Vern.* 197, 409, 159. *Curſ. Canc.* 279, 281, 290, 257 to 262. 276 to 279, &c.

The Lord Chancellor.
Baron Turner.

Nicholſon *againſt* Sherman. June 24.

On a Demurrer.

A. Bequeaths a Legacy, and makes Baron and Feme his Executors, and dies: The Baron afterwards makes his Will, and makes the Feme and his Son Executors, and dies: The Legatee of A. exhibits his Bill againſt the Feme and her Son, ſetting forth the Caſe, ut ſupra, and chargeth, That the Eſtate of A. liable to the Payment of the Legacy, is come all to the Hands of the Feme and her Son. The Demurrer was by the Son, for that the Feme, who was the ſurviving Executor of A. was only liable to his Legacies; and the Son being Executor of one of A.'s Executors that died firſt, leaving an Executor of A. to ſurvive, was not privy in Law, nor accountable for the Eſtate of A. which though it be ſo in Point of Law, yet inaſmuch as it was charged that the Son had gotten the Eſtate of A. the Demurrer was over-ruled, the Court declaring that the Eſtate of A. in whoſeſoever Hands, ought to be liable to his Legacies.

Bill for a Legacy, &c.

The Teſtator's Perſonal Eſtate, in whoſeſoever Hands liable in Equity to his Legacies.

And in Trinity-Term, 1665. this Cauſe was heard and decreed.

Note; The Rule *ſupra* ſeems founded on the Reaſon of the Common Law; for an Action is thereby given to the Next of Kin, againſt any Perſon who as *Executor de ſon Tort* is poſſeſſed of any Part of the Inteſtate's perſonal Eſtate. So in Equity a Bill of Diſcovery, &c. lies by an Adminiſtrator, &c. againſt any Perſon who is poſſeſſed of the like Eſtate. *See* of Bills to diſcover Aſſets, *poſt.* 226. 1 *Vern.* 106. 2 *Vern.* 49. What are Aſſets, *vide ant.* 14, 16. *poſt.* 128, 148, 226, 257.

DE Term. Sanct. Mich.

Anno Regis 16 Car. II.

IN CANCELLARIA.

The Lord Chancellor.

Fleming *againſt* Walgrave. October 28.

A Truſt for Raiſing Money for a Feme Sole on Condition if ſhe marry with Conſent of the Truſtees; and if not, ſuch as the Truſtees ſhall name, or elſe to themſelves, ſhall enure to the Adminiſtrator of the Feme Sole.
See *poſt.* 132.

THE Caſe was thus: 900 l. was ſecured by a Leaſe for Years for a Feme Sole, in Caſe ſhe did not marry contrary to the Liking of Sir Edward Walgrave and his Lady; and if ſhe did, then to ſuch Perſons as Sir Edward and his Lady, or the Survivor of them, ſhould nominate; and for Want of ſuch Nomination, then to Sir Edward Walgrave and his Lady, and the Survivor of them; and in this Caſe Sir Edw. Walgrave and his Lady were Leſſees in Truſt. The Feme Sole married without their Conſent; Sir Edward dies without any Appointment, and ſo did his Lady who ſurvived him, and had after the Death of Sir Edward made a general Deed of Gift of all her Goods and Chattels to one Sandal. The Queſtion was between Sandal and Francis Copledike, who was Adminiſtrator to the Lady, and alſo to the Feme Sole, who ſhould have the Benefit of this Leaſe? The Court was of Opinion, That it was not in the Power of Sir Edward and his Lady to have diſpoſed of this Leaſe otherwiſe than for the Benefit of the Feme Sole if ſhe had lived; and that Francis Copledike, as Adminiſtrator to her, and alſo to the Lady, was well intitled to the Benefit of the Leaſe, and ſo decreed it.

Note; This ſeems a Condition only *in Terrorem, &c. Vide ant.* 22, 53. 1 *Vern.* 20. *Poſt.* 90, 141, 191.

The Lord Chancellor.
Lord Chief Juſtice Bridgman.

Dickenſon *againſt* Knowell. November 3.

THE Plaintiffs were bound to one Crofts (to whom the Defendant was Executor) in 600 l. for the Payment of 300 l. Crofts was ſequeſtred by the Uſurper, and for 300 l. which the States owed the Plaintiffs, they had an Order from the Committee to retain the 300 l. of Crofts for Satisfaction. The Bond was upon the King's Reſtauration put in Suit; to be relieved againſt which, was the Scope of the Bill. The Queſtion was, Whether the Defendant was barred by the Act of Oblivion?

Bridgman being preſent, he declared, He conceived that the Defendant, inaſmuch as Crofts ſtill kept the Bond, and the Money was not actually paid, but retained, was not diſcharged by the Act of Indempnity. But it was referred to make a Caſe.

An Act of Indempnity makes good only actual Payments. *Vide ant.* 55.

What ſhall be a good Payment in Equity, ſee *Mortgages*, and 3 *Chanc. R.* 3, 101. 1 *Chanc. R.* 68, 94. 1 *Vern.* 24, 34, 150, 468, 469. 2 *Vern.* 606, 607, 265, 569. *New Caſes in Equity*, 60, 89, 118, 171.

At the Rolls.

Rand *againſt* Cartwright. November 3.

A Man makes a voluntary Deed, and then a Mortgage of the ſame Lands. The firſt Deed upon a Trial at Law is found fraudulent; he to whom the Deed is made, exhibits a Bill to redeem the Mortgage.

It was held, That though the firſt Deed was fraudulent, becauſe voluntary quoad the Mortgage-money, & pro tanto, yet that it was good as to the Equity of Redemption, and would paſs that; for that a voluntary Deed will bind the Party that makes it, and his Heirs. But the Matter was compromiſed.

A voluntary Conveyance precedent void, *quoad* a Mortgage ſubſequent, prevailed ſo as to paſs the Equity of Redemption. *Vide poſt.* 100, 217, 264. 1 *Vern.* 100. 1 *Chan. R.* 146, 173. 2 *Chanc. R.* 74.

Justice Archer.

Rennesey *against* Parrot. December 15.

On a Demurrer.

Legacies payable at Twenty-one, and no Maintenance in the mean Time. 1 *Vern.* 255, 324, 326, 335, 462. 2 *Vern.* 31, 199, 283, 417, 466, 508, 611, 673, 758, 766. *Qu.* What Equity may do in this Case.

THE Plaintiffs were Legatees, their Legacies to be paid at twenty-one Years of Age. They suggest they had no Maintenance, and by their Bill a Guardian prays, That the Defendant, who is the Executor of the Will, may allow them Maintenance.

The Defendant demurred; for that the Plaintiffs were under Age, and their Legacies were not to be paid 'till twenty-one, and so had no Cause of Suit.

Collins for the Defendant, and none for the Plaintiff.

The Demurrer over-ruled.

Resp. No doubt Equity may interpose, and order the Payment as they see fit; besides the Legacy is *debitum in præsenti*, though *solvendum in futuro*; and as it shall go to his Executors in Case of his Death, *a fortiori* it shall be paid to him to support his Life.

The Lord Chancellor.

Crispe *against* Nevil. December 16.

When the first Answer is reported insufficient, the Defendant, if he answer again, without excepting, is to answer all the Points excepted, though the same exceed the Bill. For amending Bills, Answers, &c. *vide Curs. Canc.* 39, 113, 208, 225, 226, 459. 1 *Vern.* 74, 344, 470. 2 *Vern.* 344.

THE Plaintiff excepts to the Answer. The Exceptions are referred. The Master certifies the Answer insufficient in the Points excepted to. Then the Defendants fully answer to the Charge of the Bill. But in truth the Exceptions were longer than the Bill. The Master upon a Reference to the second Answer, reports the Answer insufficient in the Points excepted unto. The Defendants except unto the Report, and upon Debate the Defendants Counsel insisted they had answered well to the Bill, and that they ought not to be put to answer any Matter but what is in the Bill. But the Plaintiffs Counsel insisted, That inasmuch as the Defendants did not except against the first Report, but had since answered, they had admitted they ought to answer to all the Matters of the Exception; and so it was ruled.

Note; the general Rule now is, where an Answer is reported insufficient, the Plaintiff may amend his Bill without paying Costs, &c. and thereon compel the Defendant to answer all such new Matter as is set forth in the amended Bill.

DE
Term. Sanct. Hill.
Anno Regis 16 & 17 Car. II.
IN
CANCELLARIA.

The Maſter of the Rolls.

Cocker *Knight, and the Lady* Elizabeth *his Wife, Daughter and Heir of* Edmund Ludlow, *Son and Heir of* Henry Ludlow, *againſt* Bevis. Jan. 23.

Mortgage and a Decree enrolled to foreclose by a Time certain, yet in Caſe of inevitable Neceſſity, &c. the Time enlarged on an Original Bill. *Vide ant.* 3, 52, &c. *ibid.*

UPON hearing and debating the Matter in Queſtion between the ſaid Parties this preſent Day, in Preſence of Counſel learned on both Sides, the Subſtance of the Plaintiff's Bill appeared to be, That Henry Ludlow having borrowed the Sum of 2000 l. of Peter Bevis, the Defendant's Father, did for Security of 1000 l. thereof, by Indenture dated Sept. 25. ann. 5 Car. 1. demiſe unto the ſaid Peter Bevis the Manor of Kingſton Deveril, with its Appurtenances, for the Term of 99 Years; and for Security of the other Sum, did by Indenture the 7th of the ſame Month, in the Year aforeſaid, demiſe ſeveral Woods called Sawley, Eulel and Ely, and divers Grounds, unto the ſaid Peter Bevis for the Term of 99 Years aforeſaid. And that the ſaid Peter Bevis, by Indenture 29 Octob. 5 Car. 1. did re-demiſe the ſaid Manor of Kingſton Deveril, with the Appurtenances, unto the ſaid Henry Ludlow,

Ludlow, for the Term of 99 Years, rendring a yearly Rent unto the said Peter Bevis of 100l. at Lady-day and Michaelmas, by equal Portions, during the Life of Susan, the Wife of the said Peter Bevis, and Richard Cubbel, and the longest Liver of them; and by another Indenture dated 9 October in the same Year, did re-demise the said Woods and Grounds unto the said Henry Ludlow for the same Term, rendring unto the said Bevis 100l. per Ann. during the Life of Richard Bevis, William Bevis, and Sabastian Isaac; which said Lands at the Time of the aforementioned Grants were worth to be sold 8000 l. and that for six Years and an Half the said Henry Ludlow did duly pay the said Rent, amounting to 1300 l. and that for Non-payment thereof, about the Year 1640. the said Bevis made his Entry, and received the Profits thereof; whereupon John Ridout, Gent. and Elizabeth his Wife, formerly the Wife and executrix of Edmund Ludlow, together with the now Plaintiffs, about Easter-Term, 1650. exhibited their Bill into this Court to have a Redemption of the said Mortgage, paying what should appear due on the said Account.

Upon hearing of which Cause in Novemb. following, it was ordered and decreed by the Consent and Agreement of the Parties, that the then Plaintiffs should pay all the Arrearages of the said Rents at 160 l. per Ann. and that upon Payment thereof the said Bevis should re-convey the said mortgaged Premisses unto the then Plaintiffs, or to whom they should appoint; and to that End did appoint an Account to be taken by Mr. Rich, then one of the Masters of this Court; and what he should find due was to be paid, 200 l. thereof at Christmas then following, and the Residue at the End of six Months, and six Months then next following, by equal Portions: Pursuant to which Order, the said Master certified there was due to the said Bevis the Sum of 4640 l. which Sum was made up of Interest during the late Troubles at 8 l. 10 s. per Cent. which said 200 l. was duly paid at the Time prefixed for that Purpose. But the Plaintiff being a Colonel in the King's Army, and about the Time allowed for the latter Payments, being engaged in his Majesty's Service at Worcester, was forced to leave the Kingdom, and thereby disabled to make Satisfaction according to the Decree; nevertheless did write to the said Bevis to sell Part of the said Lands, and pay himself what was due to him, who accordingly sold unto Sir James Thynn, and others, so much of the said Premisses as raised the whole Money,

Money, and yet continued the Poſſeſſion, and received the whole Profits of the Reſidue of the Lands, and about four Years ſince died, whereby the ſaid Premiſſes came unto the Defendant his Son, as Adminiſtrator of the ſaid Peter Bevis his Father, who continues the Poſſeſſion thereof: Therefore that the ſaid Defendant might come to an Account with the Plaintiff for the Meſne Profits by him received, and that he may re-convey the mortgaged Premiſſes to the Plaintiff, or to whom he ſhall appoint, he being willing to ſatisfy the Defendant if any Thing ſhall be found due to him on Account, is the Scope of the Bill.

Whereunto the Counſel for the Defendant inſiſted, That there was ſuch a Decree as in the Bill ſet forth, and that for the Nonpayment of the Money computed due, which conſiſted only of the Arrears of Rent, without any Intereſt for the ſame, the ſaid Decree became abſolute; upon which the ſaid Defendant reſted ſatisfied, and the Sale made to Sir James Thinn was not purſuant to ſuch Letter ſent by the Plaintiff, but ſold on the ſaid Peter Bevis's own Account, and wherein the ſaid Peter Bevis hath given a general Warranty, wherein he hath bound himſelf and his Heirs in Perpetuity, which he would not have done for a third Perſon's Advantage.

This Court nevertheleſs, after long Debate of the Matter, and hearing what could be alledged by Counſel on either Side, and reading of the whole Proofs taken in this Cauſe, and of the Decree made in the former Cauſe, which appeared to be made by Conſent, was fully ſatisfied that the Decree was in the Nature of a Mortgage, and but a Security for Money, although the ſame was made abſolute, and the ſaid Leaſe to Mr. Bevis confirmed. And inaſmuch as the Conſent and Agreement of the ſaid Parties was in Part executed by the Payment of the ſaid 200l. and the Conditions of the Times being then ſuch, that, as appeared by the Defendant's own Proofs, that Part of the Lands could not be ſold, by which the Plaintiffs could not make Satisfaction of the ſaid Decree, notwithſtanding a continued Endeavour appeared in the Plaintiffs to that Purpoſe, as his Deſire of Sale of Part of the ſaid Premiſſes to Sir James Thinn, and Sale made by the ſaid Mr. Bevis, and much Monies received by him, by Fines and otherwiſe, of ſome of the Tenants of the ſaid Manor. And it alſo appearing that this Court hath very often in ſuch like Caſes of inevitable Neceſſity, and no wilful Default appearing in the Party,

Decree in Nature of a Mortgage, and only a Security for Money.
See 2 *Vern.* 37, 88, 89, 142, 663.
1 *Vern* 57.

Where a Decree to foreclose the Money not paid, the Court in Cases of inevitable Neceſſity will inlarge the Time, tho' the Decree be ſigned and inrolled.
1 *Vern.* 131, 310. *New Caſes in Equity* 6.

The Decree avoided by original Bill upon Matter ſubſequent to the Decree
Vide ant. 3.

Party, enlarged the Time as to the Performance of the Decree, notwithſtanding ſuch Decrees have been ſigned and inrolled; and this appearing to be new Matter ſubſequent to the ſaid Decree, was alſo ſatisfied the Plaintiffs are capable of Relief in this Court, and do therefore think fit, and ſo order and decree, That both Parties do proceed to an Account; and that it be taken by Sir Thomas Bird Knight, one of the, &c. And the Plaintiff is at Liberty to take out a Commiſſion in the Country for Proof of any Thing relating to the ſaid Account; upon which Account the Maſter is to allow unto the Defendant the whole Money decreed, with Damages for the ſame ſince the Time the ſame ſhould have been paid by the Decree, deducting the 200l. already paid as aforeſaid; and that the ſaid Defendant Mr. Bevis do alſo account before the ſaid Maſter for what he really made and received of the ſaid Manor of Kingſton Deveril, by Granting Eſtates or otherwiſe; as alſo the Profits made by the Woods called Sawley, &c. by the Defendant and his Father, before Sale thereof unto Sir James Thynn; and alſo in Making and Confirming the Tenants Eſtates in the ſaid Premiſſes, which ſaid Eſtates, together with the aforeſaid Sale to the ſaid Sir James Thynn, the Plaintiff is hereby decreed to confirm, and to diſcharge the Defendant, his Heirs, &c. of all Covenants entred into thereupon, &c. And the ſaid Maſter is to appoint a Time and Place for Payment of what ſhall appear due; upon Payment whereof, it is decreed, the Defendant ſhall re-convey the ſaid mortgaged Premiſſes, unſold as aforeſaid, to the Plaintiffs, or whom they ſhall appoint, freed of all Incumbrances done by him and his Father, or any claiming by, from or under the ſaid Peter Bevis, the Defendant's ſaid Father.

The 18th of February, 17 Car. 2. upon Re-hearing the ſaid Cauſe, the ſaid Order was confirmed.

And ſee *New Caſes in Equity p.* 6. Where after a Decree ſigned, inrolled and exemplified, the Plaintiff had Relief upon an original Bill. *Ant.* 55.

The Lord Chancellor.

Woollet *againſt* Roberts. January 27.

AT the Hearing, the now Plaintiffs offered a Bill exhibited formerly by the Defendant againſt the now Plaintiffs in Evidence, to which it was agreed the now Plaintiffs had anſwered. The now Defendants objected,

that the Bill ought not to be read for Evidence against them, unleſs the Plaintiffs could prove it was exhibited by the now Defendant's Direction or Privity; for any Perſon may file a Bill in another Perſon's Name. And the Court were of Opinion that it ſhould not be read, unleſs it were proved to have been exhibited with the Privity of the Party Plaintiff in it. But the Defendant's Counſel did after admit it to be read.

A Bill in another Cauſe no Evidence againſt the Plaintiff in it, unleſs it be proved to be exhibited with his Privity.

Where Bills, Anſwers, &c. are allowed as Evidence, or not, *vide Curſ. Canc.* 150, 152. 1 *Vern.* 53, 161, 308, 366, 413, 452. 2 *Vern.* 9, 11, 66. 3 *Chan. R.* 94, 176. *New Caſes in Equity*, 9, 11, 66. *Poſt.* 73.

Juſtice Tirrel.

Sewel *againſt* Freeſton.

On a Plea and Demurrer.

THE Bill was after Verdict in an Action of the Caſe. The Equity was, That the Defendant had writ a Letter, which the Plaintiff could not prove at the Trial, which would have diſcharged the Plaintiff; and ſo ſets forth the Subſtance of it, and that the Matter lay only in the Defendant's Cognizance, and ought to be anſwered; and that the Plaintiff's Witneſſes were beyond the Seas.

A Bill after a Verdict in Caſe, on Suggeſtion of Matter in Defendant's Cognizance, which the Plaintiff could not prove at the Trial.

The Plea was of the Verdict, and that the Effect of the Letter was given in Evidence at the Trial; and Demurrer was for Want of Equity.

On Debate, it was inſiſted, That there was not any Precedent of a Bill in like Caſe after Verdict; but before Verdict might be proper for a Diſcovery. Payton and Humfrey's Caſe was cited for the Plaintiff; but anſwered, That was for Matter diſcovered after the Trial, but no ſuch Matter pretended here: And as to the Allegation of the Plaintiff's Witneſſes being beyond Seas, if the Plaintiff could not have them at the Trial, it was anſwered, That upon an Affidavit of that at Law, the Court there would have ſtayed the Trial. And the Caſe was referred to Precedents, and after the Plea and Demurrer allowed.

Of Relief deny'd in Equity after Verdicts, & *econtra*, *vide* 1 *Vern.* 176, 295, 316. 2 *Vern.* 146, 147. 3 *Chan. Rep.* 17, 25, 55. *New Caſes in Equity*, 90, 91.

DE Termino Paſchæ.

Anno Regis 17 Car. II.

IN CANCELLARIA.

Gower *againſt* Baltinglaſs. May 26.

Defendant's Counſel ordered to have a Sight of the *Interrogatories* to which ſhe was to be examined.

THE Bill was to diſcover a Writing, which 'tis ſuppoſed the Defendant the Lady Baltinglaſs had concealed, ſhe having gotten a Trunk of Writings by a Trick from a Maſter of the Court. The Defendant had put in four inſufficient Anſwers, and delayed the Plaintiff eight Years; and upon the fourth inſufficient Anſwer, was ordered to be examined upon Interrogatories; and now, upon Motion, ordered that one of her Counſel ſhould attend in the next Room when ſhe was examined, to adviſe her in any Matters of Law if ſhe ſhould need it. And afterwards, on another Day, ordered on Debate, That her Counſel ſhould ſee the Interrogatories, but not have a Copy.

Of Examining Defendants on Interrogatories on Contempts, &c. *vide Curſ. Canc.* 94, 242. 2 *Vernon* 435. 3 *Chan. Rep.* 90. 2 *Chan. Rep.* 18.

Love *and others againſt* Baker, Roll, *and* Clutterbuck. May 28.

THE Defendants brought a Joint-Action at Leghorn againſt the Plaintiffs, and had there arreſted the Plaintiffs Goods. The Defendant Baker being here, and the other Defendants at Leghorn, Baker anſwered here, and by Dyer a Subpœna left with him was to be good Service for the other Defendants, and thereupon an Attachment for want of an Anſwer; and upon this an Injunction was granted to ſtay the Defendants Proceedings at Leghorn. Now the Defendants moved to diſſolve the Injunction, and inſiſted it was a new Caſe.

A *Supœna* ſerv'd on one Defendant here, ordered to be good Service for the other Defendants beyond the Seas.

Vide Curſ. Canc. 6, 25, 64, &c. and 71 to 79, 107, 117.
2 *Vern.* 369.
1 *Vern.* 172.

The Lord Chancellor conceived it to be a dangerous Caſe to ſtay their Suit there, and ſo deprive them of their Remedy. To which it was anſwered, All Parties might have Juſtice, and be fully heard in this Court: But the Plaintiffs would be without Remedy, if the Defendants proceeded at Leghorn, and got Poſſeſſion of their Goods. And the Court declared they would adviſe with the Judges herein; and afterwards the Lord Chancellor declared, he had adviſed with the Judges, and that they were of Opinion the Injunction ought to be diſſolved. Sed quære; for all the Bar was of another Opinion. It was ſaid, The Injunction did not lie for Foreign Juriſdictions, nor out of the King's Dominions. But to that it was anſwered, The Injunction was not to the Court, but to the Party.

The Lord Chancellor.

Smith *againſt* Pemberton. May 30.

THE Mortgagee had aſſigned the Mortgage. The Mortgagor comes to redeem. The Queſtion was, If what was really due to the Mortgagee when he aſſigned, for Principal and Intereſt, and paid him by the Aſſignee, ſhould be taken as Principal, or ſo much only as the Mortgagee firſt lent?

All Money really due and paid by the Aſſignee to the Mortgagee, to be taken as Principal againſt the Mortgagor from the Time of the Aſſignment.

Ordered, That all Monies really paid by the Aſſignee, that was due to the Mortgagee, ſhould be Principal to the Aſſignee. But the Account between the Mortgagee and Aſſignee was not to conclude the Mortgagor, but the Maſter to ſee what was really due at the Aſſignment, and whether he had really paid the Money; for if the Aſſignment was colourable, it would be otherwiſe.

The Lord Chancellor.
Chief Juſtice Bridgman.
Baron Turner.
The Maſter of the Rolls.

Lord Digby *againſt* Langworth. May 30.

Truſt. Whether a Recovery by Tenant in Tail, with Remainder in Tail to another, ſhall bar the Remainder. *Ant.* 49.

WHether Tenant in Tail of a Truſt, Remainder in Tail to another; if the Tenant in Tail by ſuffering a Recovery, that Recovery ſhall bar the Remainder, which is no ſettled Intereſt veſted.

Bridgman was of Opinion it ſhould not. But it was referred to a Caſe, and the Judges to conſider of it. See the Caſe of Goodrick and Brown, fol. 49.

See 2 *Vern.* 132, 226, That not only a Common Recovery (and that defective) will bar an Eſtate Tail in Truſt; but that bare Articles will bar an Entail of an Equity, and a Child in *ventre ſa mere* may be vouched, *ibid.* 711. Alſo 1 *Vern.* 10, 440. That when ſuffered by a *Ceſtuyq; Truſt* in Tail, it bars the Entail and all Remainders.

The Lord Chancellor.
Chief Juſtice Bridgman.
Judge Archer.

Sherly *Eſq;* *againſt* Fagg. June 1.

Upon a PLEA.

A Purchaſer from *A.* of Lands to which B. pretends Title, gets *B.*'s Title Deeds.

THE Plaintiff by his Bill made Title to the Lands in Queſtion by an Intail of his Great-Grandfather, 9 Jac. whereby the Premiſſes were limited to the Great-Grandfather for Life, Remainder to the Plaintiff's Grandfather by Name for Life, Remainder to the Plaintiff's Father by Name for Life, Remainder to the firſt Son (which the Plaintiff is) and other Sons in Tail, and ſhews how

by Virtue of thoſe Limitations the Great-Grandfather, Grandfather and Father did enjoy during their reſpective Lives, and the Plaintiff's Father died about ten Years ſince, the Plaintiff then an Infant of ten Years old; and that the Plaintiff ought to enjoy by that Settlement. And the Bill complain'd that Sir John Fagg and the reſt of the Defendants had entred into ſeveral Parts of the Premiſſes, and did divide the ſame among them, having gotten the Evidences and the Settlement, and did conceal the ſame; which the ſaid Sir John had gotten into his Hands from one Walter, for a Reward to him, or otherwiſe; and he had altered and confounded the Bounds and Names of the Land: And ſo to have a Diſcovery of Evidences, and the Deed of Settlement, and Delivery up of the ſame, was the Scope of the Bill.

A Purchaſer from *A.* of Lands which *B.* makes Title to, getting the Deeds making out *B.*'s Title, is not bound to diſcover them.

2 *Chanc. Caſes* 4, 133, 134.

The Defendant Fagg pleaded, That for 6870 l. really paid to the Earl of Thanet, he purchaſed the Premiſſes of him by good Conveyance at Law; and demands Judgment, Whether he ſhall further diſcover his Title, or any Deeds or Evidences to weaken it? And upon long Debate, after a Caſe ſtated, the whole Court was of Opinion that the Plea was good.

See of Pleas and Demurrers to Bills for Diſcovery of Title Deeds, &c. 2 *Chanc. R.* 29, 68. 2 *Chanc. Caſes* 4, 133. 3 *Chanc. R.* 6, 17, 50, 53, 55. *Curſ. Canc.* 125, 157, 305, &c. 1 *Vern.* 27, 117, 176, 212, 273, 308, 399. 2 *Vern.* 35, 50, 98, 380, 561, 471, 591, 38, 442, 463.

DE

DE
Term. Sanct. Hill.
Anno Regis 17 & 18 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.

Baker *againſt* Shelbury. February 10.

The Maſter ordered within a ſhort Time to ſue his Apprentice's Indentures, or elſe to deliver them up.

THE Bill being to be relieved againſt an Apprentice, Bond and Articles, and to have them up. Upon hearing, ordered that the Defendant do within a certain Time (viz.) one Year, bring his Action, and go to Trial thereupon for his Damages; or in Default thereof, the Bond and Articles to be delivered up. And the Reaſon that was given was, That if it were at the Defendant's choice to ſtay his Action as long as he pleaſed, he would ſtay till the Plaintiff's Witneſſes were dead. And it was ſaid it was uſual in the Caſe after Apprentices were out of their Time, to exhibit a Bill to put their Maſter to ſue their Covenants within a certain Time, or elſe to deliver up their Indentures.

Of Relief in Equity between Maſters and their Apprentices, Servants, &c. ſee 1 *Vern.* 95, 136, 208, 460. 2 *Vern.* 64, 492, 518, 643.

The Lord Chancellor.

Digardine *againſt* Swift. February 22.

UPON a Motion, it was ordered, That where one of the Bail at Law for the Plaintiff had proſecuted a Suit in Equity in the Plaintiff's Name in his Abſence, the Plaintiff not being to be found, and the ſaid Perſon his Bail acting throughout the Cauſe in this Court as Party and Solicitor, that the Solicitor ſhould pay the Defendant here his Coſts. But this was in Reſpect he was Solicitor and Proſecutor, and not as Bail; for there being other Perſons that were Bail, the Court declared they would not charge them with the Coſts. And the Maſter of the Rolls, to whom this Matter was formerly moved, as concerning the Solicitor's paying the Coſts, deſired to ſee Precedents before he made any Order; and declared in this Caſe, That if there were any one Precedent, he would make the Second.

The Solicitor to pay the Coſts where the Party abſents himſelf. Vide poſt. 86, 87.

And note, in the Caſe of Scandal, &c. in a Bill or Anſwer, 'tis now a commenable Practice to charge the Counſel with Coſts.

And Counſel in Caſes of Scandal, &c.

The Lord Chancellor.
Juſtice Windham.
Baron Turner.

Drake *againſt the Mayor of* Exon. February.

A Leſſor and Leſſee for Years, the Leſſor covenants with the Leſſee and his Aſſigns to renew, then the Leſſee becomes Bankrupt, and Commiſſioners of Bankrupt aſſign this Covenant. The Aſſignee brought this Bill to have the Defendant, the Leſſor, renew to him. The Caſe was referred to Juſtice Windham and Baron Turner, and they certified the Plaintiff ought not to be relieved; and ſo he was diſmiſs'd.

Bankrupts, *vide ant.* 19. *poſt.* 232, 275, 307.
Commiſſioners of Bankrupt cannot aſſign a Covenant in a Leaſe to renew, 2 *Vern.* 194. nor Money agreed for a Purchaſe, &c. See 1 *Vern.* 94, 95, 267, 268. 2 *Vern.* 96, 97, 229, 428.

Serjeant Nudigate, who was Counſel in this Caſe for the Defendant, ſaid, It had been ruled in this Court, that Commiſſioners of Bankrupt might aſſign an Equity of Redemption of a Mortgage. But quære; for it ſeems to be

Qu. Whether they can aſſign an Equity of Redemption? See 2 *Vern.* 157. or the Benefit of an Award to a third Perſon. 2 *Vern.* 229.

But they may Legacies, &c. 2 *Vern.* 432.

be againſt the Statute, which enables them to the Benefit of a Condition that is perfoꝛmed, and not foꝛfeited.

And note; all Statutes relating to Bankrupts bind Courts of Equity as well as thoſe at Law. 2 *Vern.* 697.

The Lord Chancellor.
Judge Windham.

Lawrence *againſt* Braſier.

Money payable by Condition of a Bond moderated in Reſpect of the Office, out of which it was to iſſue, taken away.
Vide poſt. 83, 84, 126, 190.

A Bond was entred into beſoꝛe the Wars, conditioned to pay 40 l. per Annum, foꝛ twelve Years, out of the Profits of an Office, which was taken away by the Uſurpers. And the Obligoꝛ being ſued on the Bond, and the Office reviꝛed, he exhibits his Bill to be reliꝛed againſt the Bond. The Obligee inſiſted, That the Office continued ſome Part of the twelve Years, and being now reviꝛed, the Obligoꝛ ought to pay the 40 l. per Annum, foꝛ twelve Years, oꝛ be diſmiſs'd; foꝛ the Obligee having the Law with him, ought not to be hurt in Equity, without Satisfaction accoꝛding to the Condition.

It was decreed, That the Obligoꝛ ſhould pay the 40 l. per Annum, foꝛ ſo many Years as the Office continued, and thereupon the Bond to be delivered up.

Note; This Caſe and thoſe hereafter, *pag.* 74. 78, 83, *&c.* are founded on that general Rule, That Equity relieves againſt Accidents; *vide Max. Eq.* 27. and the like againſt Force, as the Caſe of *Harriſon* verſus *North*, *poſt.* 83, 84. So of Frauds, *&c. vide poſt.* 133, 134. And the old verſe is well known, *viz.*

For Fraud, Force and Accident,
Equity is Relievant.

Quære if the Caſe *ſupra*, and that *poſt.* 83, 84. be not Exceptions to this Rule?

DE

Termino Paſchæ,

Anno Regis 18 Car. II.

IN

CANCELLARIA.

The Lord Chancellor.
Baron Turner.

Terwit *againſt* Greſham. March.

ORdered upon long Debate, That Depoſitions of Witneſſes taken in a former Cauſe thirty Years ſince, where the ſame Matters were under Examination and in Iſſue as in this, (the Point being concerning Incumbrances and Dampnification in both Cales) ſhould be made uſe of in this Cauſe, albeit the Plaintiff in this Cauſe, and thoſe under whom he claims, were not any Parties in the former Cauſe, inaſmuch as the Tertenants were then Parties, and the now Plaintiff's Title did not then appear, and the Witneſſes were dead. And Precedents were cited for this between Trinity-Hall and Doctors-Commons, where Dr. North's Depoſitions taken in a former ancient Cauſe, where neither of the now Parties were Party, were read. And the like between Culton and Vaughan.

Depoſitions in a former Cauſe between other Parties, read againſt one that claims not under any of thoſe Parties. *Vide ant.* 65. *Poſt.* 175, 236, 233. *Kelw.* 96. *a. b.* *Hard.* 180. *Ant.* 25. *Poſt.* 229. *Kelw.* 100. *a.*

Where Anſwers or Depoſitions in Chancery may be read as Evidence, or not, *vide* the Caſes cited *ſupra*, and 1 *Vern.* 53, 161, 413. 2 *Vern.* 447, 472.

The Lord Chancellor.

Armitage *againſt* Metcalf. May 16.

Where the Heir being forced to pay the Debt of his Anceſtor, ſhall recover againſt the Executor. *Poſt.* 271. See *Max. Eq.* 19. 2 *Chanc. Ca.* 5, 84, 85. 1 *Vern.* 36, 37, 436. 2 *Salk.* 449.

THE Cauſe being heard about 1664. and one Point being, That the Obligor having paid a Debt of his Anceſtor's upon Bond, might be re-imburſed his Money by the Executor of the Obligor, who had perſonal Aſſets, the Heir being forced to pay the Debt by a Suit, it was decreed the Executor ſhould re-imburſe the Heir as far as there were perſonal Aſſets come to the Executor's Hand. And upon Exception taken to a Report in this Cauſe, which came to be heard before Mr. Baron Atkins, 29 Junij, 1668. there was this Point: Whereas A. alone was bound to the Teſtator, the Executor delivered up the Bond, and took another to himſelf for the ſame Debt, whereby, as was alledged by the Counſel of the Executor, the Security was bettered; And whether this in Equity ſhould be charged as Aſſets in the Executor's Hands, he having delivered up the old Bond? was the Queſtion.

Where the delivering up of a Bond by the Executor, and taking a new Bond to himſelf for the Debt, is no Converſion in Equity to charge the Executor with the Payment of that Money. *Ant.* 51. *Poſt.* 88, 121, 191.

Againſt the Executor it was inſiſted, That the Taking the new Bond had alter'd the Property of the Debt, ſo that if the Executor died Inteſtate, his Adminiſtrator would have the Debt; whereas if it had reſted on the old Bond, the Adminiſtrator de bonis non of the firſt Teſtator ſhould have it ſubject to the firſt Teſtator's Debts. It was admitted that at Law this did charge the Executor as a Converſion and Receipt of ſo much of the Eſtate. But it was inſiſted, That in Equity he having taken the ſame Perſon, and another bound, and offering to aſſign the Bond to the Heir it ought not to charge him, eſpecially when the Heir is Plaintiff in Equity, as here. And it was ruled, That the Executor ſhould not be charged with the Money by altering the Security, but that he ſhould aſſign the Security to the Heir.

For it is not Equity that the Executor ſhould ſuffer for his Care in taking a new Bond with further Security; and the Debt was loſt, not by his Default, but through Accident only, againſt which Equity relieves. *Vide Max. Eq.* 27. *ant.* 72. *poſt.* 83.

The

The Lord Chancellor.
The Maſter of the Rolls.

Smallpiece *againſt* Anguiſh. May 25.

THE Bill ſuggeſted, That the Defendant did endeavour to ſet up a Will, pretended to be made by one that died in the great Sickneſs in London, and that the Defendant was Executor of it; whereas there was no ſuch real Will, but obtained unduly, and that was conteſted in the Spiritual Court; and yet the Defendant in the interim being inſolvent, endeavoured to get in the Debts due to the Eſtate. The Defendant demurred, for that the Bill contained no Equity, and the Suggeſtion of Inſolvency might be made againſt every Executor. But the Demurrer was over-ruled; and upon Motion it was ordered, That the Debtors to the Deceaſed's Eſtate ſhould forbear to pay any Money 'till the Matter ſettled in the Spiritual Court.

Injunction to Debtors to a Teſtator's Eſtate not to pay any Money to a pretended Executor, 'till his Title to the Executorſhip were ſettled in the Spiritual Court.

And note, That upon Examination this was found to be a forged Will, and the Defendant ſtood in the Pillory for it. *Quære*, If done without a Trial at Law?

Forgery.

See 1 *Vern.* 66, 292. of Forgeries examined in Chancery.

Of the Force and Effect of Injunctions, *vide poſt.* 80. 1 *Vern.* 25, 120, 156, 207, 275, 329, 489. 2 *Vern.* 116, 119, 519. 1 *Chanc. R.* 44, 52, 55, 188. 3 *Chanc. R.* 2, 9, 21, 22 71. *Curſ. Canc.* 438 to 452, 368 to 370, and *ibid.* 37, 44, 47, 49, 82, 89, 92.

DE
Term. Sanct. Mich.
Anno Regis 18 Car. II.
IN
CANCELLARIA.

In Court. The Maſter of the Rolls.

Knipe *againſt* Jeſſon. November 13.

The Factor (not the Imployer) to have the Benefit of ſtolen Cuſtoms. *Vide ant.* 25 and 30. *Max. Eq.* 24.

THE Defendant imployed the Plaintiff as his Factor beyond Sea, and brought an Action of Account againſt the Plaintiff here at Law, and had Judgment quod computet. The Plaintiff brought his Bill here to have an Allowance upon Account for what he had ſaved in not paying the Cuſtoms for thoſe Goods (which could not be allowed before the Auditor, as was ſaid); and an Allowance was decreed to the Plaintiff for the ſame againſt the Defendant the Imployer; and ſo it was referred to a Maſter to take the Account. Vide Smith and Oxenden, f. 25. and Borr againſt Vandale, f. 30.

This Caſe is founded upon that general Rule of Equity, that he ſhall have the Satisfaction or Benefit, who would have ſuſtain'd the Loſs (*i. e.* where he is not *particeps criminis*). See *Max. Eq.* 21, 22, 23, *&c.* But if he be criminal himſelf, 'tis otherwiſe; for no Man ſhall have Benefit by his own Crime.

Hampden *againſt* Brewer. November 19.

On a Demurrer.

Two Executors (the one conditional) are Parties; the Conditon is broken; the other Executor muſt revive. *Ant.* 51, 74. *Poſt.* 277.

RIchard Hampden made the Plaintiff and his Widow Executors, under this Condition, That if the Widow married, her Executorſhip to ceaſe, and the Plaintiff to be ſole Executor. The Plaintiff and the Widow exhibited the Bill, to which the Defendant anſwered, and ſeveral Orders were made, one (inter alia) by Conſent to refer Matters finally to be determined. Then the Widow married, and it became a Queſtion in this Caſe, Whether the Plaintiff might proceed upon that Bill, (wherein there was no Mention that the Widow's Executorſhip was Conditional, but the Bill was by both as Executors General) or whether he muſt bring a Bill of Revivor? And upon a Reference of that Point to Chief Juſtice Bridgman, he was of Opinion he muſt bring a Bill of Revivor; though Serjeant Fountain, upon producing the Will under Seal, whereby it appeared the Widow's Executorſhip was conditional, ut ſupra, did inſiſt, That there was no need of Revivor. This was the Reſult of the former Debates.

Demurrer, becauſe more was prayed to be reviv'd than can be. *Vide ant.* 45. *poſt.* 226. *Curſ. Canc.* 210, 211.

A Bill of Revivor was brought, which was to revive all the former Proceedings, and particularly the Order by Conſent.

The Defendant did demur to the Bill, for that it ſought to revive that Order, whereas the Feme was a Party to it; and ſhe being married ſince her Executorſhip, conſequently her Conſent was determined. And upon Debate (which was the only Work of this Day) the Demurrer was allowed.

In Court. The Maſter of the Rolls.

Underwood *againſt* Staney. November 24.

Obligee in a Bond loſt, hath Remedy againſt the Surety in Equity. 1 *Vern.* 196.

THE Obligee in a Bond of twenty Years old, exhibits his Bill againſt the Adminiſtrator of the Principal and the Surety (upon loſs of his Bond.) The Adminiſtrator ſaith by his Anſwer, that he hath no Aſſets. Upon hearing the Cauſe, it was directed to a Trial, Whether the Surety had

Poſt. 120. *Latch.* 24, 146.

had ſealed and delivered the Bond; and a Verdict had paſſed againſt the Surety, (viz.) That he had ſealed and entred into the Bond. And the Cauſe coming back to this Court, and the Plaintiff's Counſel praying a Decree for the Plaintiff's Debt againſt the Surety, Serjeant Fountain (not of Counſel on either Side) ſaid it was doubtful whether Equity ſhould in this Caſe bind the Surety, who was not obliged in Law, but in reſpect of the Lien of the Bond; and that being loſt, and the Surety having no Benefit by (nor Conſideration for) being bound, he thought Equity after ſo long a Time ſhould not charge the Surety. The Maſter of the Rolls ſaid he would ſee to moderate and mediate this Matter between the Parties; in order to which, he was ſeveral Times attended by the Plaintiff; and the Defendant making Default, he decreed for the Plaintiff. And afterwards the Cauſe was upon a Caſe made, brought before my Lord Chancellor, who was of Opinion with the Maſter of the Rolls, and decreed it for the Plaintiff.

Obligee in a voluntary Bond loſt, hath Remedy in Equity. *Vide ant.* 74. *Max. Eq.* 29, 72. 1 *Vern.* 196. *Ant.* 34, 49. *poſt.* 99.

It was in the Debate of this Caſe ſaid, That if a Grantee in a voluntary Deed, or an Obligee in a voluntary Bond, loſe the Deed or Bond, they ſhould have Remedy againſt the Grantor or Obligor in Equity. Tamen quære. But if ſo, no Miſtake in the Principal Caſe, where the Bond was for Money lent; and though the Surety had no Advantage, yet the Obligee had parted with his Money, and Loſs is as good a Conſideration for a Promiſe, as Benefit or Profit.

Loſs as good a Conſideration of a Promiſe, as Profit.

Of Relief given where Bonds or other Deeds are loſt, &c. *vide Max. Eq.* 29. *ant.* 11. *Latch.* 24, 146, 148. *New Ca. Eq.* 86. 2 *Chanc. R.* 100. 1 *Vern.* 59, 180, 247, 310. 2 *Vern.* 35, 50, 98, 380, 471, 476, 561, 591. And ſee 1 *Vern.* 59, 180, 247, 310. In what Caſes a Man muſt make Oath of the Loſs of a Deed, when he brings a Bill for Relief or Diſcovery touching ſuch Deed. *Vide ant.* 11.

DE
Term. Sanct. Hill.

Anno Regis 18 & 19 Car. II.

IN
CANCELLARIA.

In Court. The Maſter of the Rolls.

Dr. Thorndike *againſt* Allington. Jan. 26.

A Deviſe was to the Plaintiff by the Defendant's Father (whoſe Son and Heir the Defendant was) of 20 l. per Ann. out of a Rectory, with a Clauſe of Diſtreſs for Non-payment.

The Glebe belonging to the Rectory was but of 40 s. per Ann. and the Tithe not being ſubject at Law to a Diſtreſs, and ſo no ſufficient Remedy at Law for the Rent, thereupon the Plaintiff brought his Bill to have the whole Rectory liable to the Rent, and the Defendant decreed to pay it. On the Defendant's Part it was inſiſted, That this Court ought not to extend a Remedy beyond what the Deviſor appointed, and the Plaintiff muſt take ſuch Remedy as by Law he might. To which the Plaintiff's Counſel replied, That the Deviſor gave the Annuity out of the whole Rectory, and intended the Tithe as well as the Glebe ſhould be liable to it; and that in Caſe of a Rent-ſeck, where the Grantee had no Seiſin, this Court had frequently given Relief by Decree here. But the Defendant's Counſel inſiſted, That that was not like this Caſe, becauſe in that Caſe there was no Remedy at Law at all.

Remedy in Equity for a Rent, where the Remedy at Law is not ſufficient. 3 *Chan. R.* 11. *ant.* 32.

Moor 805. *Pl.* 1092. *Latch.* 146. 4 *Leon.* 184. *Poſt.* 80, 120, 145, 147, 185.

Rent-ſeck without Seiſin recoverable in Equity, *poſt.* 147, 185.

The

The Perſon made liable to the Arrears of Rent, with which he was not chargeable at Law. *Vide poſt.* 147, 185.

The Court decreed, That the whole Rectory be liable to pay the Annuity, and that the Defendant do pay the Arrears and Coſts. Yet Note this ſeems to be otherwiſe held ſince, *viz.* Though Equity will grant a Remedy where there is none at Law, yet it will not where there is one at Law, tho' it be not effectual. *Quære* and *vide Max. Eq.* 25. *Poſt.* 144, 147.

The Maſter of the Rolls.

Beverſham *againſt* Springhold. February 11.

Injunction not to prove a Will in the Spiritual Court. *Vide ant.* 75.

A Perpetual Injunction awarded againſt the Defendant, not to prove a Will touching a Perſonal Eſtate only in the Prerogative Court.

But note, That in this Caſe it was directed by this Court to be tried at Law, Whether a Will or no; and found againſt the Will; and then this Injunction was awarded.

The Lord Chancellor.

Gilpen *againſt* Smith *Knight, and Dame* Dorothy *his Wife, and* Zouch.

Where the Huſband is bound in Equity for Debts, Contracts, &c. of the Wife *dum ſola. Poſt.* 295. 1 *Vern.* 309, 143. 2 *Vern.* 118.

UPON a Re-hearing before the Lord Chancellor, Sir Edward Zouch ſeized in Fee of Lands, ſettled them on Truſtees after his Death for Payment of his Debts, and dies, leaving the Defendant Zouch his Son and Heir, an Infant, and the Defendant Dame Dorothy his Widow: She entereth upon the Lands, and taketh the Profits, (the Truſtees not at all acting) then ſhe marries Lloyd. After the Marriage, he continues to take Profits during his Life, as ſhe had before. He dies; then the Defendant Sir ..... Smith intermarries with Dame Dorothy, and ſhe being in Receipt of the Profits 'till that Time, the Defendant Smith continued to receive the Rents until the Defendant Zouch came of Age. The Plaintiff was a Creditor of Sir Edward Zouch, and his Bill was againſt the Heir of Sir ..... Smith and his Wife, and the Truſtees, to have his Debt paid.

This Cause being first heard at the Rolls, it was there decreed, That the Plaintiff's Debt should be paid, and that both the Lands and Smith (in Respect of the Profits taken by Dame Dorothy and Lloyd and himself) should be liable to the Payment thereof; with this, That if it fell on the Heir to pay the Debt, he should have the Benefit of the Decree to re-imburse him against Sir ..... Smith, so far as the Profits taken by Dame Dorothy, Lloyd and Smith did extend.

From this Decree Sir ..... Smith and his Wife appealed. And for Sir ..... Smith it was insisted, That he ought not to be charged with the Profits taken by the Lady, or Lloyd her former Husband; and farther, That she had Assets of Lloyd's Estate, to whom she was Executrix.

Whether the second Husband be answerable for Profits of Land wrongfully taken by the Wife *dum sola*, and after by her former Husband, during their Coverture.
See *Max. Eq.* 20.
1 *Vern.* 309.
Post. 121, 295.
1 *Vern.* 309.
2 *Vern.* 118.
New Cas. in Eq. 31.
Max. Eq. 20.

The Argument on Sir ..... Smith's Part was thus: Either the Profits taken by the Lady and Lloyd were taken by Right (for there was a Pretence she entred on the Lands as Part of her Jointure) or by Wrong; if by Wrong, then Lloyd the Wrong-doer being dead, the Tort was dead with him, and so there was no Remedy to be answered for that Wrong; and compared this Case to a Trespasser, and the Trespasser dead. If by Right, then not answerable over for them.

Serjeant Maynard for the Heir insisted, That both by Law and Equity Sir ..... Smith and the Lady were answerable for the Profits taken by the Lady, and after by Lloyd; as if Feme, Tenant pur vie, marry, and the Husband doth Waste and dies, Waste lies against the Wife. And compared it to the Case where a Feme Executrix takes a Husband that wasts the Testator's Estate, a Devastavit lies against the Feme after the Husband's Death for the Waste of the Husband. And the Feme, by her Entring and Meddling, had made her self liable to answer what she had took as a Debt; and Lloyd her Husband, upon his Marriage, continuing to take the Profits as she did, it is a Continuance of the Wrong she did, and by Colour of her having entred before and taking the Profits, made her liable for her own Receipts, as a Debt owing by her. And her Marriage with Lloyd, which is her own Act, cannot discharge her self; and the Husband must be looked

upon as gaing in this Caſe, by Reaſon of the Wife's ſo Acting before. And ſo, upon the whole Matter, the Court conceived the Decree juſt, and that Sir ..... Smith muſt take his Wife chargeable with this Debt. But upon the Proof that the Mother and the Son were related to the Earl of Angleſey, it was referred to him to moderate the Matter, if he could; if not, then directed a Caſe to be made.

What Acts of the Wife ſhall bind the Husband, and how far he is obliged by her Contracts (when Sole) in Equity, ſee *Curſ. Canc.* 469 *to* 477. And note; regularly where the Wife is Defendant, you can't ſerve her with Proceſs alone without ſerving the Husband alſo, tho' the Matter in Queſtion concern her only. See 1 *Chan. Rep.* 68.

See the Husband's Eſtate in the Hands of another ſubjected to the funeral Charges of the Wife. *New Caſ. Eq.* 31.

A Feme Covert parted from her Husband, waſtes Goods, the bare Uſe whereof was only deviſed to her for Life, with Remainder over to a Stranger; the Husband ſhall anſwer the Value. 1 *Vern.* 143.

A Feme Adminiſtratrix waſtes the Aſſets, and then marries, and dies: The Husband is liable for no more than for the Value of the Aſſets that came to their Hands after the Intermarriage. 118.

How far a ſecond Husband is liable to a *Devaſtavit*, or Breach of Truſt, by his Wife and her firſt Husband, 1 *Vern.* 309. *Vide ſupra.*

2

D E

DE
Termino Paſchæ,
Anno Regis 19 Car. II.
IN
CANCELLARIA.

The Lord Chancellor.
The Maſter of the Rolls.

Sir John Harriſon *againſt the Lord* North, *Executor of the Lady* Mountague. April 25.

Whether Tenant held out by Force by Soldiers in Time of Rebellion ſhall for the Time be relieved in Equity againſt Payment of his Rent.

THE Plaintiff was Tenant to the Lady Mountague of a Houſe in London, at a certain Rent: He left the Houſe, and went to Oxon to the late King, and then ſent his Servant with the Key of the Houſe to the Lady, and deſired her to re-enter and accept the Surrender. She ſaid ſhe would adviſe with the Defendant her Son-in-Law, who then ſate in the Houſe of Commons, and acted with them; afterwards ſhe refuſed to accept of a Surrender. The Houſe was made an Hoſpital by the Parliament for maimed Soldiers. The Defendant as Executor to the Lady, brought Debt at Law againſt the Plaintiff for Rent incurred while the Houſe was ſo uſed, and all the Time. To be relieved againſt which Action was the Scope of the Bill.

Vide ant. 72. *poſt.* 126, 190.

Finch pro Quer. It is but reaſonable, that if a Tenant be put out by ſuch againſt whom he can have his Remedy over, that he notwithſtanding be liable to pay his Rent to the Leſſor: But here the Plaintiff hath no Remedy over; and it was an Act of Force in the Parliament, which is pardoned by the Act of Oblivion, and ſo no Remedy over, and the King hath pardoned all his Arreats of Rent. The Law of England is ex vi termini ſtrict in the Matter of Rents than other Nations; for redditus & reddere is accepted as reſtituere, and render implies apprendre.

Maynard for the Defendant. The Plaintiff hath a pitiful Caſe, but not ſuch as this Court can relieve; for the Law and Equity is all one in this Caſe; and if the Matter be no good Bar at Law, it is not good in Equity. And he inſiſted, That if Rebels, the Kings own Subjects, do an Act of Force, and hold a Tenant out, that is no Equity to excuſe him from Payment of his Rent; and cited the Caſe of Carter and Cummins about two Years ſince in this Court, where the Plaintiff being a Tenant of a Wharf, which by an extraordinary Flood was carried all away, brought his Bill to be relieved againſt paying of his Rent; but all the Relief he had was only againſt the Penalty of the Bond, which was broken for Non-payment of the Rent; and the Defendant ordered only to bring Debt for his Rent. And he inſiſted, That a Surrender of Lands is no Cauſe for Apportionment of Rent, which is ſtronger than the Principal Caſe. The Lord Chancellor took Time to adviſe; but declared, if he could he would relieve the Plaintiff.

Ant. 72. *Poſt.* 126, 190.
Æquitas ſequitur Legem.
Carter and *Cummins*'s Caſe.

Frank *againſt* Frank. May. 17.

A Man ſeized in Tail of Freehold Lands, with Remainder to his Elder Brother, and of Copyhold Lands in Fee, deviſeth his Lands to his Younger Brother, and the Copyhold Lands to his Elder Brother, and dies. The Deviſees agree by Writing under their Hands, that the Lands ſhould be enjoyed by them reſpectively accordingly; and to draw on this Agreement, the Younger Brother pretends the Deviſor did ſuffer a Recovery of the Freehold

Agreement on a Miſtake. *Quære* if it ſhall bind the Party. *Vide poſt.* 85, 171, 172.
2 *Vern.* 97, 455, 617, 627.

hold Lands, and produceth an Exemplification of a Recovery. Upon Search it was found there was a Writ of Entry brought, and a Warrant of Attorney to appear was entred; ſo that had the Party that ſuffered the Recovery been living, he might have perfected the Recovery; but there is no Recovery of Record. The elder Brother being informed there was no Recovery upon Record, and ſo the Deviſor could not deviſe the Freehold Lands from him, and he being in Truth entitled to the Copyhold as Heir at Law, and not by the Will, no Surrender being made to the Uſe of it, brought his Action at Law to recover the Freehold Lands. The younger Brother exhibits his Bill upon the Agreement, and pretends there was a Recovery, howbeit the Record was imbezil'd, and prays he may hold according to the Agreement between him and his Brother.

Recoveries. *Ant.* 49. *Poſt.* 120.

And upon Hearing at the Rolls, it was decreed, That he ſhould enjoy the Freehold Land, and an Injunction awarded to ſtay the elder Brother's Suit.

From this Decree the elder Brother appealed by Bill of Review, and upon hearing of the Bill of Review, it was inſiſted for the Plaintiff therein, That the Agreement between the two Brothers was parol only, and that the Pretence of a Recovery was a Fraud, there being none; and that if there was an Intention, and it was never executed, that Intention can never found a Decree againſt the Statute de Donis; and that the Agreement doth not alter the Caſe, it being introduced by Fraud, there being in truth no Recovery, nor no Surrender of the Copyhold to the Uſe of the Will. So that the Plaintiff in a Bill of Review ought to have both Freehold and Copyhold.

Parol Agreement, *poſt.* 226. *Vide* 1 *Vern.* 363, 221, 240. 2 *Vern.* 34, 112, 200, 202, 322, 617. *New Caſes in Eq.* 86, 87.

Maynard for the Decree. The Queſtion is not, Whether the Recovery ſhall bar or not? but, Whether here is not enough to fortify and execute the Agreement? He inſiſted farther, That the Plaintiff had departed from his Title to the Freehold Lands; and though the Agreement was not ſealed, yet it was under Hand, ſo that the Certainty of it was not to be diſputed; and ſo relied upon the Agreement, and that in that Reſpect the Decree was well grounded, and thereupon the Bill of Review was diſmiſs'd with Coſts; for modus & conventio vincunt Legem. So that in this Caſe the Agreement of the Party, upon Conceit he had not (when in Truth he had) a Title to permit an

Where an Agreement, though conceived upon Miſtake, ſhall bind the Party.

Hard. 200, 204. *Poſt.* 239, 240.

another to enjoy Lands, ſhall for ever bind him; and yet this Agreement doth appear to be upon no valuable Conſideration.

In Court. The Maſter of the Rolls, in the Abſence of the Chancellor.

Colwel *againſt Sir* William Child, *a Maſter of this Court.*

Rep. Chanc. Part 1. 195.

Award by Order of Reference, though not made within Time, &c. yet decreed.

Of Awards, &c. *Vide poſt.* 185, 186, &c. there cited, *ant.* 40. *poſt.* 279, &c.

ALL Parties to a Suit here conſent to refer the whole Matter to Serjeant Maynard, finally to be heard and determined; and Old Child, the now Defendant's Father, ſignified his Conſent by ſubſcribing a Paper for that Purpoſe, ſo as the Award was made by a certain Day limited in this Paper. That elapſed, and then the Court in Preſence of all Parties but Old Child, (who was then abſent) by the Aſſent of his Solicitor referred it back to Serjeant Maynard; but it was not inſerted in the Order, that he ſhould finally determine. Upon this, Serjeant Maynard made an Award, which was afterwards decreed, unleſs Cauſe ſhewn. Old Child ſhewed for Cauſe, that he did not conſent; and his Solicitor made Oath he did not conſent Serjeant Maynard ſhould finally determine; yet the Award was decreed. Hereupon a Bill of Review was brought, and Error aſſigned; and upon the Hearing of this Bill of Review, it was inſiſted, That the Matter of Old Child's Diſſent was dehors, and not contained in the Decree. And it was ſaid, The Court could not take Notice of that, inaſmuch as there did not appear any Diſſent in the Decree it ſelf.

Errors in Law. 1 Error.

Solicitors aſſenting to Interlocutories may bind, but not to final Reference. *Ant.* 71.

First Error aſſigned was, That the Aſſent of the Solicitor ſhall not bind the Party. Againſt which it was objected, That Solicitors are here as Attornies at Law. And if an Attorney confeſs Judgment, the Party is bound by it; and that uſually Solicitors are looked upon here as Attornies at Law; as for Inſtance, In a Maſter's Report made in the Preſence of Solicitors. But it was anſwered and reſolved by the Court, That although Solicitors Aſſent to Interlocutories may bind, yet it cannot bind to a Re-

ference finally to determine. And it was ſaid and admitted, That an Attorney's Aſſent to an Award ſhall bind his Client. And this Error was declared by the Court to be good Cauſe of Reverſal. And it was declared it ſhould not lie upon the Plaintiff to ſhew Old Child's Diſſent; for it appears upon the Decree, that it was the Solicitor's Aſſent; and if the Decree want a ſufficient Foundation, it is Error, and the Plaintiff ſhall not be put to ſhew a Negative. And the Plaintiff's Counſel cited a Caſe between Brooks and Dickens, about 1652. where an Award was ſet aſide for that the Party did not actually aſſent to the Reference, and yet attended the Reference in the Buſineſs. Vide ante 40. poſt. 185, 186, 279.

Award ſet aſide, for that the Party did not actually aſſent unto the Reference.
1 *Vern.* 158, 470.
2 *Vern.* 100, 109, 251.

For that the Award was but for Parcel of the Matter in Controverſy, and not of the whole Matter, whereof the Reference was to determine. And this Error allowed.

2 Error.
Award erroneous, for that it's but of Part of the Matters referred. *Vide poſt.* 186. 2 *Vern.* 169.

For that the Decree was impoſſible; for by the Award (decreed) Old Child was to pay a Sum of Money 24 Jan. 1654. or ſurrender an Eſtate; and the Decree was dated after the ſaid 24 Jan. 1654. and ſo impoſſible. And this was allowed to be Error.

3 Error.
Decree impoſſible.
Vide ant. 3.

For that the Award was repugnant; for it awarded Old Child to deliver up an Obligation of 800 l. in Satisfaction of 400 l. of 1000 l. which he was to pay, and to vacate a Suit in Satisfaction of 600 l. Reſidue of the ſaid 1000 l. although there was not any Reſidue after the 400 l. and 600 l. ſatisfied. And this was ruled to be for Error alſo. And ſo the Decree was reverſed.

4 Error.
Decree repugnant.

Then it was moved, That the Solicitor who aſſented, and who was now Solicitor in this preſent Cauſe, ſhould pay Coſts to the Defendant Dr. Child; but reſolved he ſhould not; for that the Aſſent he gave was in Court, and the Court knew ſuch Aſſent would not bind the Party; and 'twas the Folly of the other Party to proceed on that Aſſent.

Solicitor not to pay Coſts.
Vide ant. 71.

Touching Counſel, Attornies and Solicitors in Chancery, *vide ant.* 66, 71. *poſt.* 277. 1 *Vern.* 203, 312. 2 *Vern.* 265.

The

The Maſter of the Rolls.

Smith *againſt* Smoult. January 21.

Whether the Mortgage-money belongs to the Heir or Executor of the Mortgagee.
Vide ant. 51.
1 *Vern.* 3, 37, 70, 170, 412.
2 *Vern.* 367, 582.

THE Queſtion was, Whether the Mortgage-money ſhould be paid to the Heir or Executor of the Mortgagee? And it was for the Heir inſiſted, That it was ruled in a Caſe between Tilley and Egerton, in Michaelmas 1660. heard by the Lord Chancellor, aſſiſted by the Lord Bridgman, there being no Defect of Aſſets in the Executor's Hands, that the Heir ſhould have the Money, who is to convey the Eſtate. And this was ſaid to be the firſt Precedent of this Kind. The Court will ſee Precedents.

And afterwards, about Michaelmas or Hillary-term, 1667. the principal Caſe was heard before the Lord Keeper Bridgman, where the Order in the Caſe of Egerton was produced; but in the principal Caſe there appeared to be a Bond for Payment of the Mortgage-money, which goes to the Executors; and the Condition of the Redemption was upon Payment of the Money to the Executors, &c. (without naming the Heir.) So it was ruled in the principal Caſe, That the Money ſhould be paid to the Executor. But the Lord Keeper ſaid, That if the Condition of the Redemption had been to pay the Money to the Heir or Executor, and no Bond were in the Caſe, nor no Want of Aſſets of the Perſonal Eſtate, it might have been otherwiſe. And in the Caſe of Egerton, in reading the Order it did not appear how the Condition was penned; but the Court now took it that the Money was payable to the Heir by the Condition. Saint John againſt Grabham, 11 Car. 1. adjudged by the Lord Keeper, That the Heir, and not the Executor, ſhould have the Money, being payable by the Condition to the Heirs or Aſſigns of the Mortgagee.

Payable to the Heir.
1 *Vern.* 298, 299, 402.
2 *Vern.* 193, 416, 508, 582.

But note; By the Caſes cited in the Margin *ſupra*, the Money is generally decreed to be paid to the Executor, tho' expreſly by the Deed made payable to the Heir, *&c.*

DE
Term. Sanct. Trin.
Anno Regis 19 Car. II.
IN
CANCELLARIA.

Elſton Wallis *and others, Executors of* Anne Smith, *againſt Sir* Thomas Crimes *Baronet*, John Scot *Eſq; and others.* June 4.

A Truſt of Lands for the Benefit of younger Children antecedent to a Mortgage, &c. decreed. See 1 *Vern.* 28, 29, 63, 69, 99, 100, 204, 256, &c.

IN 1656. Sir George Crimes, Father of the Defendant Sir Thomas, and whoſe eldeſt Son the Defendant Sir Thomas was, demiſed the Lands in queſtion to Anne Smith for 2000l. for 2000 Years by way of Mortgage, Sir George then being in Poſſeſſion, and taken to be the abſolute Owner. 19 January, 1643. Sir Thomas Crimes, Father of Sir George, had conveyed the Premiſſes to the Defendant Scot and others, and their Heirs, upon Truſt, that if Sir George, within ſix Months after his Father's Death, ſecured to the Truſtees 500l. for the Benefit of Sir George's younger Children, then (after ſuch Security firſt given to the Truſtees) to convey the Premiſſes to Sir George and his Heirs as he ſhould appoint: And 'till the Time limited for giving the Security, the Truſtees to ſtand ſeized to the Uſe of Sir George's eldeſt Son (which Sir Thomas is) for his Maintenance; and in Default of ſuch Security, the Truſtees, at the Requeſt of Sir George's eldeſt Son, to convey to him. This appearing to be the Caſe in Proof upon a Bill exhibited by the Plaintiffs to inforce a Redemption, or to hold diſcharged of Equity,

the Court decreed that the Plaintiffs do hold and enjoy the Premisses for Security of the 2000 l. with Interest, against the Defendants and all claiming under them, charged with the 500 l. to Sir George Crimes's younger Children from the Time the Plaintiff came into Possession, and that the Defendants do accordingly execute Conveyances, unless the Defendant Sir Thomas Crimes do pay the Mortgage-money and Interest by a Day.

Bill of Review.

The Defendant brought a Bill of Review to reverse this Decree; and for Error shewed, That in Default of giving Security in six Months after Sir Thomas's Death, the Trustees were to convey to the Defendant and his Heirs; and the Security was first to be given, before Sir George was to have any Thing in the Lands; and that Sir George being dead, that was impossible, he having not given any Security.

1 *Mod.* 307.

A Breach of *a Condition precedent* relieved in Equity as in the Nature of a Penalty.

But upon Debate of the Matter, upon an Answer put in to the Bill of Review, and hearing of the Cause before the Lord Keeper Bridgman, 28 Octob. 1668. he declared he saw no Cause to reverse the Decree, but looked upon the Condition precedent to be in the Nature of a Penalty, and would regard the Intent of the Trust, which was to secure 500 l. to the younger Children, which, with the way the Plaintiffs went in this Bill of Review, could not be. And so dismiss'd the Bill of Review.

Note in 2 *Vern.* 333 and 339, 'tis laid down as a Rule, That Equity cannot relieve against the Breach of a Condition precedent, nor give an Estate that never vested by Reason of the Non-performance of a Condition precedent. And in 1 *Vern.* 83, That there is no Relief in Equity in Case a Condition precedent is not performed: And *ibid.* 456, That it will not relieve against the Breach of a Condition in a voluntary Settlement. And yet *ibid.* 223, 'tis ruled that in all Cases where the Matter lies in Compensation, let the Condition be precedent or subsequent, Equity will relieve; and so is 1 *Vern.* 83, 167, 270, *&c.*

Note a Gift to an Infant on Condition, it binds the Infant, 2 *Vern.* 561. See more of Conditions, *ant.* 22, 53, 58. *post.* 141, 191.

DE
Term. Sanct. Mich.
Anno Regis 19 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Hide *againſt* Pettit. October 25.

THERE having been a Decree in this Caſe for a Perſonal Duty, and a Sequeſtration awarded againſt the Defendant's Real and Perſonal Eſtate by the late Lord Chancellor, aſſiſted by Baron Turner: It was now moved by the Defendant's Counſel againſt this Sequeſtration, and inſiſted, That this Court did not anciently grant any Sequeſtration but ſparingly, and that only of the Thing in demand; and that the Sequeſtration in this Caſe took more than all the Executions at Law; and that Sequeſtrations had been extended ſo far of late, as to ſequeſter Things in Action, which no Execution at Common Law can reach, and the Conſequence of which would be deſtructive to Trade and Commerce. And beſides, when any Purchaſer is brought into this Court upon the Proceſs of Sequeſtration upon Sequeſtration, that this Purchaſe is ſubſequent to the Sequeſtration, or for other Reaſon bound thereby; whereas many Perſons ſo brought in are really Purchaſers, or have other good Titles, which neither are

Argument *pro & cont.* Sequeſtration. See 1 *Lev.* 241, and the Argument in 1 *Chanc. R. verſ. Finem.*
1 *Vern.* 58, 160, 228, 247, 248, 421.

nor ought to be bound thereby; those Persons so brought in are looked upon as Contemners and Delinquents, and forced to answer Interrogatories blindfold, without having a Copy of them, or Liberty to shew them to Counsel; by which means Persons coming into this Court to defend their Interest, are often through their own Unskilfulness concluded in their just Rights, even against Right, to the great Dishonour of the Court and of Justice. But to maintain the Sequestration, it was insisted by Fountain, That they were very ancient in this Court, and cited a Case, 17 Jac. Zacheverel against Zacheverel, where a Sequestration was awarded both against Lands and Goods, and the Thing decreed was a Personal Duty; and the Sequestration was awarded by the Court, assisted with the Judges, upon View of four Precedents. Russel against Read: The Defendant being in the Fleet, the Money decreed was sequestred, it being in the Fleet; this in the Lord Coventry's Time. And 18 Feb. 1662. assisted with Baron Turner in this principal Case, and the Case of Bedingfield and Zouch, That a Sequestration should be the usual Process of this Court, and the Course of the Court is the Law of the Land, and an Executor might bring an Action here before the Statute gave it. And it was urged, If you should take away Sequestrations, the Justice of the Court would be elusory; and that after a Suitor had been at great Charges in obtaining a Decree, if the Defendant would lie in Prison, there would be no Remedy for the Plaintiff to come by the Fruit of his Decree; and the Remedy by Imprisonment would be ineffectual; for if he go abroad, no Escape lies. Upon a Judgment in a Court-Baron, a Levari Fac' goes, which takes all the Profits of the Lands, and a Statute before a Mayor takes all. And therefore not unreasonable that so great a Court as this should have an effectual Means of bringing Suitors to the Fruit of their Suit, which without a Sequestration cannot be done.

Sequestration against Lands and Goods. *Post.* 221, 222, 241.

The Power and Jurisdiction of the *Chancery.*

See the Tract of the Chancery Jurisdiction at the End of the first Vol. of *Chancery Reports*, and the Case of the King and *Standish.* 1 *Lev.* 241.

And as to sequestring Things in Action, there is no such Thing sequestred in this Case. And as to the Danger of bringing Persons that came in for their Interest as Delinquents, by Means of Sequestration, and their being deprived of Counsel to answer; that is the Case of every Decree and Contempt where there is no Sequestration, and is the Course there as well as in the Course of Sequestrations.

The

The Court will ſee Precedents; and after, at another Time, declared, It was ſatisfied the Sequeſtration in the principal Caſe was well awarded, and that Sequeſtrations were a neceſſary Proceſs of this Court.

Sequeſtration againſt Lands and Goods well awarded.

See *New Caſes*, 2d Part 124. No Sequeſtration of Lands in *Ireland*, for a Contempt, &c.

The Lord Keeper.

Sir Henry Henn *againſt Sir* Henry Conisby.

October 25.

MONEY of the Defendant's was lent out by one Yarway to the Plaintiff, upon the Security of a Mortgage and Recognizance, and the Security was taken in one Cambel's Name in Truſt for the Defendant. The Money was lent 1659. and paid in to Yarway in 1663. and all Intereſt for the ſame; and Yarway during that Time and a Year after, paid the Intereſt to the Defendant, but the Defendant himſelf kept the Security. Yarway failed, and the Queſtion was, Whether the Payment of the Money to Yarway (who had not paid it over to the Defendant) ſhould be taken as a good Payment to conclude the Defendant?

Whether Money paid by the Borrower to the Scrivener that is imploy'd in lending of the Money, without taking up the Security, be a good Payment to conclude the Lenders. See 1 *Vern.* 150. 2 *Vern.* 606, 607, 197, 265, 539. *Poſt.* 99, 111, 119.

For the Plaintiff, it was laid down by his Counſel as a Rule, That where one places Money in a Scrivener's Hands with this general Truſt, for him to put it out where he pleaſeth, there by that general Truſt or Authority the Payment back to the Scrivener is good Payment.

And it was proved by Witneſſes, that the Defendant had ſaid, He had truſted Yarway with the greateſt Part of his Eſtate, and he feared he ſhould be cozened; which the Plaintiff's Counſel inſiſted on as Evidence to prove that the Defendant truſted Yarway with his Money: But as to that, it was anſwered by the Defendant's Counſel, That Conisby lent Yarway other Monies on his own Security, which he loſt, ſo might ſay he was like to be cozened by the ſaid Yarway. But it was farther inſiſted by the Defendant's Counſel, That the Defendant kept the Security himſelf, which clearly ſhewed that Yarway did not act under ſuch general Authority as was alledged by the Plaintiff's Counſel. And it was inſiſted, That that one Circumſtance would rule the Caſe; and no Man will pay the Money due upon a Mortgage and Recognizance (no not on

on a Bond) without having the Security up; and the Payment of the Money by the Plaintiff to the Scrivener without having up his Security, was an Evidence that he did truſt the Scrivener more than the Defendant did, (who always kept the Security himſelf) and he that truſted moſt is to be cozened.

A Caſe between Sir Gilbert Gerrard and Baker was cited by the Defendant's Counſel, where Money was paid to one that did uſually receive for the Obligee, yet the Obligee not truſting the Receiver with the Bond, it was held no good Payment.

The Court conceives the Caſe is againſt the Plaintiff, in regard the Defendant kept the Security, but will ſee Precedents; Engliſh againſt Lee, a Precedent cited by the Plaintiff in 1655. And after the Court had peruſed the Precedents on both ſides, Paſch. 1668. Judgment was given for the Defendant, That the Payment to the Scrivener ſhould not conclude him: But he was ordered to take the Principal without Coſts.

See alſo 1 *Vern.* 150. *Roberts & al. verſ. Mathews, &c. Hill.* 1682. where 'twas decreed according to the Caſe *ſupra*, That Money paid by the Borrower to the Scrivener who was imploy'd in lending it, is no good Payment, the Scrivener not having the Cuſtody of the Securities, (nor was the Payment endorſed thereon) though he had all along received the Intereſt.

And 2 *Vern.* 265. A Scrivener lends his Client's Money to *J. S.* and takes a Bond and Warrant of Attorney to confeſs a Judgment in his Client's Name, to whom he gives a Copy of the Judgment, but keeps the Bond; and afterwards receives the Money, and delivers up the Bond to *J. S.* *Quære* if he is liable to pay the Money over again?

Note; Payment of Money to a Truſtee, with Notice of the Truſt, is a Miſ-payment, though the Truſtee had Judgment and Execution againſt the Perſon that paid the Money. 2 *Vern.* 197. *vide ibid.* 539.

DE
Term. Sanct. Hill.
Anno Regis 19 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Mary Thomas *Widow*, *againſt* Edward Porter, Phineas Porter, *and* Robert *Biſhop of* Worceſter. February 8.

No Relief in Equity againſt wilful Forfeitures. *Vide poſt.* 156, 202, 226. *Max. Eq. pag.* 5, 6. See 2 *Vern.* 91, 103, 263, 478, 537, 572, 664.

THE Plaintiff was Tenant durante Viduitate of the Lands in queſtion, being Copyholds of a Manor, whereof the Defendant the Biſhop was Lord, Remainder to Edward Porter. The Defendant had felled Trees, which at a Court-Baron was preſented, and found a Waſte, and conſequently a Forfeiture by the Homage; and the Defendant Edward was afterwards at another Court, after an Entry made by the Biſhop for Forfeiture, admitted, and brought Ejectment, and before a Judge of Aſſize had a Verdict.

To be relieved againſt which was the Bill, which did ſuggeſt, That the Timber that was cut was worth but 40s. and the Eſtate 60 l. per Ann. and that there was 300 l. worth of Timber ſtanding; and that if upon Examination it ſhould appear to be Waſte, the Plaintiff would make Satisfaction.

The Defendant Porter by Anſwer inſiſted, That the Waſte was voluntary, and declared to be ſo by the Judge of

of Aſſize before whom the Judgment was; and that the Timber felled was worth 60l. Upon the Proofs there was a great Difference touching the Value of the Timber felled, and ſome Proof of a Load or two of Boards that were carried off the Premiſſes by the Plaintiff, which for her was inſiſted were carried to another Copyhold within the ſame Manor; but there was not any Proof that the Plaintiff had ſold any of the Timber ſhe felled; and it was proved the Copyhold in queſtion was much out of Repair, and for the Plaintiff inſiſted, that with that Timber ſhe intended to repair the ſame.

The Lord Keeper. It was not clear there was any wilful Forfeiture, for that the Defendants before the Plaintiff had applied the Timber, took Advantage of the Forfeiture, and the Defendants were ever forward therein; and yet withal declared, That in Caſe of a wilful Forfeiture he would not relieve; and then referred the Cauſe to the Biſhop, the Defendant, to be Chancellor in this Cauſe.

Upon this, the Biſhop certified the Waſte to be wilful, and no Ground to relieve the Plaintiff.

Upon this Certificate, the Cauſe coming to be heard before Juſtice Tyrrel (in Abſence of the Keeper) he pronounced an Order to diſmiſs the Bill; which being ſtayed by a Petition to the Lord Keeper, 11 Novemb. 1668. he re-heard the Cauſe; at which Time it was inſiſted for the Plaintiff, That the Lord Keeper could not delegate his Juriſdiction to the Biſhop, as the Order on the firſt hearing did mention; which was admitted; and it was made out by Affidavits, That the Biſhop's Son had taken a Bond from the Defendant Porter for 50l. if the Cauſe went for the Defendant Porter.

A Forfeiture of a Copyhold by felling of Timber relieved in Equity.

Upon this Hearing, it was referred to a Trial at Law upon this Iſſue, Whether the primary Intention in felling the Timber was to do Waſte? But as the Order was drawn up, the Iſſue to be tried was, Whether the ſuppoſed Waſte was wilful or not?

See *Max. Eq.* 6 and 44. *poſt.* 202. *New Ca. in Eq.* 75. 1 *Vern.* 449. 2 *Vern.* 537 and 664.

And upon two ſeveral Trials it was found for the Plaintiff; and ſo after theſe two Trials, it was decreed, The Plaintiff ſhould be relieved, and the Defendant to deliver Poſſeſſion, and account for the meſne Profits.

In Court. The Maſter of the Rolls.

Saint John, *Eſq; againſt* Holford *Baronet, and others.* February 9.

Counter-Security given againſt one Debt ſhall extend to be Security againſt another Debt. 2 *Chanc. Caſes* 194, 195. 2 *Vern.* 39, 235, 524, 751, *&c.*

THE Defendant's Grandfather (whoſe Heir and Executor the Defendant is) became bound with the Plaintiff's Father (whoſe Heir the Plaintiff is) in ſeveral Bonds, as his Surety for 4000 l. The Plaintiff's Father conveyed the Manor of Colwerton by Way of Mortgage to the Defendant's Grandfather, to counter-ſecure him againſt the ſaid Bonds for 4000 l. The Plaintiff's Father prevailed with the Defendant's Father to become bound with him afterwards for 2000 l. more. Then the Plaintiff's Father paid off 1500 l. of the 4000 l. Debts by Bond.

The Bill was, to be admitted to redeem upon Payment of what the Defendant's Grandfather or himſelf had paid off or been dampnified by the Bonds for the 4000 l. and what remained unpaid of the 4000 l. And the Queſtion was, Whether the Plaintiff (inaſmuch as there was no Agreement proved that the Mortgage was to be a Security to the Defendant's Grandfather againſt the Bonds for the 2000 l. as well as thoſe for 4000 l.) ſhould be admitted to redeem upon Payment of the 4000 l. without the 2000 l. And it was ruled, and ſo decreed, That if the Plaintiff would redeem, he ſhould re-imburſe and ſave harmleſs the Defendant as well touching the 2000 l. as the 4000 l. upon this Rule, He that will have Equity to help where the Law cannot, ſhall do Equity to the ſame Party againſt whom he ſeeks to be relieved in Equity.

He that will have Equity muſt do Equity. See *Maxims in Equity, pag.* 1, 2, 3, 4. *& infra.*

Serjeant Maynard and Fountain were of Counſel in this Caſe with the Plaintiff, and did without any Debate reſt in this Order. Serjeant Fountain ſaid, It was a juſt Decree.

Hill. 1667. Upon an Appeal to the Lord Keeper Bridgman, the Decree was confirmed.

For the Rule *ſupra*, ſee 2 *Chanc. Caſes* 23, 87, 97, 164, 194, 195. 1 *Chan. Rep.* 95. 2 *Chan. Rep.* 247, 360. 3 *Salk.* 84. *Vern.* 29, 40, 120, 167, 244, 245, 262, 294, *&c.* 350, 467.

Gore *against* Blake.

Whether the Overplus of the Profits of a Term deviſed out of an Inheritance, in Truſt to pay Debts, to the Executor, who is reſiduary Legatee, doth belong to the Heir or Executor.
Rep. Chanc. 263.
Vide poſt. 286.
Max. Eq. 21, 22.
2 *Chan. Caſes* 115.
1 *Salk.* 154.
2 *Vent.* 359.

THE Caſe being ſtated by Order, came this Day to be determined; and in Effect it was thus: A. by his Will, whereof he makes B. his Executor, deviſeth (inter alia) that B. ſhall take the Rents and Profits of his Lands of Inheritance for fifteen Years, in Truſt to pay his Debts, and upon other Truſts; and after ſeveral particular Legacies, bequeaths all the Reſidue of his Goods and Chattels to B. his Executor. It falls out that all the Debts are paid, and all the Truſts performed, and there is an Overplus of the fifteen Years beſides what was ſufficient to pay the ſame.

The Queſtion was between the Heir and the Executor of B. Who ſhall have the Remainder of the fifteen Years after the Debts paid, and Truſts performed? For the Heir it was ſaid, there was a Difference between this Term, being out of the Inheritance, and a bare Chattel; and that the Overplus of this Term being out of the Inheritance, ſhould attend it; and there was not any Intention in the Teſtator to give the Executor the Profits for fifteen Years, otherwiſe than to make Proviſion for Payment of his Debts, and thoſe other Truſts; and that the End being ſatisfied, the Reſidue of the Term did ceaſe, and return to the Inheritance. But for the Executor it was inſiſted, That the fifteen Years was a Term, and then the Deviſe of the Reſidue of the Goods and Chattels did paſs.

Curia. The Term is in the Deviſee, and there paſſed an Intereſt; and if it had been deviſed, the Executor ſhould take the Profits for fifteen Years; and then the Appointing the Debts to be out of the Profits, and the other Truſts, doth not alter it, ſo conceives the Reſidue of the Term belongs to the Executor, and not to the Heir; and ſo decreed. Tamen quære.

And note; This *Quære* is well made, for that in all doubtful Caſes the Heir is to be preferred before the Executor; for wherever Lands are given or deviſed to pay Debts, &c. the Heir after Payment made ſhall have the Lands, 2 *Can. Caſes* 115.

Alſo if a Leaſe or Deviſe be made for Years by one ſeized in Fee for the ſame Purpoſe, after Debts paid, the Remainder ſhall go to the Heir, tho' not ſo expreſt, and tho' in the Caſe of an Executor. 2 *Ventr.* 359. And wherever a Term is created (out of Lands) for a particular Purpoſe, the Overplus ſhall go to the Heir. 1 *Salk.* 154. And how far an Heir is to be favoured in Equity, ſee the *New Caſes in Equity*, *pag.* 32, 90, 122, 157, 159, 171. 1 *Vern.* 167, 204, 271.

Sir Joſeph Douglaſſe, *and his Wife, againſt* William Waad.

JAmes Waad, the Defendant's Father, having married a firſt Wife, did in her Life-time, many Years before her Death, by ſeveral Fines and Deeds ſettle the ſeveral Manors of Buttles and Payton-Hall, to the Uſe of himſelf for Life, Remainder to his firſt and all his other Sons in Tail. Afterwards the firſt Wife dies without Iſſue; then James Waad marries with the Daughter of Eltonhead; but before Marriage agrees with Eltonhead, that in Conſideration of 1000 l. Portion, which Eltonhead was to pay her, to ſettle her a Jointure of 300 l. per Ann. (of which it appeared in the Caſe Buttles Manor was to be Part) but what the other Lands were that were to make up the 300 l. per Ann. did not appear. James Waad hath Iſſue by his ſecond Wife the Defendant, and died, leaving the ſecond Wife, who married Douglaſſe the Plaintiff.

Marriage a good Conſideration to make the Feme a Purchaſer. *New Caſes in Equity*, 132.

Conſideration, *ant.* 34, 49, 78. 1 *Vern.* 433, 483, 484.

Their Bill is againſt the Defendant, to have him decreed to ſettle the Jointure on the Defendant's Mother, and to ſet aſide the Settlement made by James Waad againſt the Jointreſs as fraudulent.

When this Caſe was firſt brought to hearing, there was no Proof of Payment of the 1000 l. Portion by Eltonhead; it proved that Eltonhead maintained James Waad, and furniſhed him with Money for other Uſes.

And it was inſiſted on the Plaintiffs Part, that Marriage was a good Conſideration to make the Joyntreſs a Purchaſer; and it was her Father that was to pay the 1000 l. and not ſhe, and ſo ſhe was clearly a Purchaſer. If a Man ſecure his Purchaſe-money, it is Payment. And to this Opinion that ſhe was a Purchaſer, the Lord Chancellor inclined. And the Plaintiffs Counſel, Serjeant Maynard and Fountain, inſiſted, That the Joyntreſs being a Purchaſer, the Settlement being after the Marriage of the firſt Wife, was fraudulent as to the Joynture, which the ſecond Wife claims by the Marriage Agreement.

Security of Purchaſe-money is Payment.

On the Defendant's Part it was inſiſted, The firſt Conveyance was good, and cannot be ſet aſide by the Marriage Agreement: For it was not in the Power of the Fa-

ther after the first Settlement to avoid it, and every voluntary Conveyance is not fraudulent. The Chancellor of Oxford's Case, Merry and Littleton's Case, 10 Jac. Fraud is not to be presumed. And this Conveyance was by Fine, and so notorious and upon Record; and there could not be any Intention of Fraud as against the second Wife; and it is rare that this Court takes upon them to judge a Deed fraudulent.

Every voluntary Conveyance is not fraudulent. See 3 *Chanc. R.* 85, 114.

To which it was replied, Fraud is only cognizable here, and was only proper here before the Statutes; and every voluntary Conveyance is presumed to be fraudulent, unless he that claims by it can prove the contrary.

But *prima facie* it is presumed to be fraudulent. *Vide post.* 217, 264. 1 *Chan. R.* 146, 173. 2 *Chan. R.* 74. 1 *Vern.* 100, *ant.* 59.

The Lord Chancellor inclines, the Joyntress is a Purchaser; and whether the Deed be fraudulent, proposes to have it tried; but after referred it to a Case. And a Case being stated to the Effect ut supra, with this more, That there was a Release given by James Waad for the Portion, 25 Febr. 19 Car. 2. the Cause came to be heard before the Lord Chancellor and Baron Turner.

A voluntary Conveyance precedent, as to a Marriage-agreement subsequent, is fradulent.

At which Time the Court declared the Marriage was a good Consideration to make the Feme a Purchaser; and besides, upon the Release for the Portion, it was clear she was a good Purchaser, and that all voluntary Conveyances are prima facie to be look'd upon as fraudulent against Purchasers, unless the contrary be made appear; and so decreed the Settlement by James Waad to be set aside as fraudulent.

The Defendant brought a Bill of Review, and assigned for Error, That it was not cognizable here whether a Deed were fraudulent, but that was only triable at Law; and besides, no Colour of Fraud against the Joyntress; for the Deed, as appears by the Decree, was made in the Life of the first Wife, who lived ten Years after, and the second Wife not then thought on. And the Settlement being by Deed and Fine, ought not to be presumed fraudulent without Proof. And it was farther assigned for Error, That by the Decree the Settlement as to Payton-hall was to be Part of the Joynture; and she was not, as appeared, any Purchaser as to that; and so no Reason to set aside the Settlement as to Payton-hall, under the Notion of the Joyntress being a Purchaser, for that it did not appear that that was within her pretended Purchase.

To this Bill of Review the Defendants demurred, and inſiſted that the Decree was well grounded; and upon Debate thereof before the Lord Chancellor and Baron Turner in Trinity-Vacation, 19 Car. 2. the Demurrer, as to the Points above, was allowed.

But as to another Particular, touching the meſne Profits (which Point I have not ſtated) the Plaintiff in the Bill of Review was, upon arguing of the Demurrer, relieved, and the Decree ſo far explained (that is to ſay) Whereas by the Decree the Defendant was to anſwer, and pay all the Arrears of the 300l. per Ann. to the Joyntreſs ſince his Father's Death, whereas it appears by the Decree, that by a former Decree of the Court the meſne Profits had been applied firſt to the Payment of Eltonhead's Debts, and afterwards been taken by the Lady Waad; and the Defendant was neither charged as Heir or Executor to his Father, nor had any Aſſets to anſwer the Arrears.

Account of meſne Profits. *Vide* 1 *Vern.* 433.

It was ordered, That the Defendant ſhould be chargeable only with ſo much Arrears as he had received out of the Lands.

Note the Caſe of *Beard verſ. Nuthall*, 1 *Vern.* 427. A voluntary Bond was given by the Husband after Marriage, to make a Jointure on the Wife; he makes a Jointure accordingly, and the Wife gives up the Bond; after which the Jointure was evicted, &c. 'Twas decreed, That the Jointure ſhould be made good out of the Husband's perſonal Eſtate (there being no other Debts) and that the Delivering up of the Bond by the Wife, during the Coverture, ſhould not bind her.

D E

DE Termino Paſchæ,

Anno Regis 20 Car. II.

IN CANCELLARIA.

The Lord Keeper.
The Maſter of the Rolls.

Pearſon *againſt* Pulley. April. 25.

THE Bill being to redeem a Mortgage made in 1632. and it being inſiſted on by the Defendant, That he came in as an Aſſignee at the third hand, and ſo it would be hard to put him to an Account now; the Lord Keeper ſaid, That in Regard there had been no Stint put to the Time a Mortgage is to be redeemed, the Defendant ſhall come to an Account; but in Regard he comes in at an old Hand, ſhall not account but ſo far only as goes in Diſcount of his Money, but not for the Surpluſage. And he ſaid he would have a Rule to limit to what Time a Mortgage ſhall be redeemable; and conceived twenty Years to be a fit Time, in Imitation of the Statute of Limitation of real Actions: But gave no Rule in that, but only he directed that when a Bill came to redeem an old Mortgage, the Defendant ſhould plead or demur to it, that ſo the Judgment of the Court might be had upon it.

Special Directions touching the Time to redeem old Mortgages. *Poſt.* 107, 108, 109.

Of Time to redeem Mortgages, and what bars it, *vide* 1 *Vern.* 8, 29, 41, 132, 138, 183, 190 to 193, 215, 209, 244, 268, 295, 336, 418. 2 *Vern.* 84, 207, 235, 279.——286, 288, 377, 392, *&c.*

The

The Lord Keeper.
The Maſter of the Rolls.

David Jenkins, *Eſq; againſt Sir* Charles Kemis, *Baronet, and others.* April 28.

EDward Kemis, Eſq; deviſeth the Lands in Queſtion after other Eſtates Tail (which are all ſpent) to Sir Nicholas Kemis for Life, Remainder to his firſt Son, and the heirs Males of his Body, with other Remainders over; Sir Nicholas hath Iſſue Charles, Father of the Defendant Charles. In 1637, the Defendant's Father married Blanch the Daughter of Manſel, with whom he had 2500l. which Sir Nicholas had, and thereupon Sir Nicholas and Charles his Son levied a Fine, and ſuffered a Recovery, and five years after, viz. 1 April, 18 Car. 1. by Indenture Tripartite, whereto Sir Nicholas and Charles his Son are both Parties named; and tho' Charles never ſealed, yet he conſented to the Uſe thereof, reciting that Nicholas was Tenant for Life, the Remainder to his Son Charles prout, and the Marriage of Charles prout, and that his Wife's Portion was 2500l. and that Sir Nicholas had it, and the Fine and Recovery had thereupon, and in Conſideration thereof, the Uſes of the Fine and Recovery are declared to be to Sir Nicholas for Life, the Remainder to his Son Charles, and the heirs Males of his Body, begotten on the Body of Blanch; the Remainder to the heirs Males of Sir Nicholas; the Remainder to the heir Males of the Body of Sir Charles the Defendant's Father; the Remainder to the right heirs of Sir Nicholas, with a Power to Sir Nicholas by Deed or Will to charge the Land with 2000l. as he ſhould think fit. After in January, 18 Car. 2. the Marquis of Worceſter borrows of the Plaintiff's Father 2000l. which was applied to the King's Service, and prevails with Sir Nicholas Kemis, and Charles his Son, then both under his Command, by Leaſe and Releaſe to convey the Premiſſes to the Plaintiff's Father in Fee, by Way of Mortgage, wherein they covenant to make farther Aſſurance. The Mortgagors continue Poſſeſſion, and die. The Defendant is eldeſt Son and heir of the ſaid Charles Kemis by a ſecond Wife, Blanch being dead without Iſſue, but claims the

Rep. Chanc. Part 1. 275.
Where a legal Defect in Execution of a Power may be ſupply'd in Equity. *Vide poſt.* 241 & 160, 161. and the Caſes there cited.

the Premisses as Issue in Tail by the Settlement as Son and Heir of his Father. The Mortgagee brought Ejectment against the Defendant, and thereupon a Special Verdict, ut supra, and upon Argument ruled against the Plaintiff; whereupon the Plaintiff, being as well Executor as Heir to his Father, brings his Bill in Equity, suggesting the Tripartite Deed antedated, and however to be meerly voluntary and fraudulent as to the Defendant, he not being the Issue of Blanch, and so not within the Consideration of the Tripartite Deed and Settlement, and the Plaintiff being a Purchaser, and the Defendant's Father or Grandfather being taken by the Plaintiff's Father to be seized in Fee when they made the Mortgage. And it was farther insisted on by the Bill, That Sir Nicholas having a Power to charge the Premisses with the Payment of 2000 l. and the Mortgage being for 2000 l. tho' it were by Way of Conveyance of the Lands, and not by a Charge of the Lands, and so according to Strictness of Law not good: Yet in Equity it ought to be taken as in Execution of the Power, and that nice legal Defect ought therefore to be supplied in Equity to the Plaintiff, who is in under a Purchaser.

Whether a legal Defect in Execution of a Power may be supplied in Equity.
4 *Leon.* 8.
2 *Vent.* 350.
1 *Levinz* 238.
2 *Chanc. Cases*, 30.
Post. 241, 160, 161, and the Cases there cited.

For the Plaintiff it was farther insisted, That Sir Nicholas's Power ought to be knit to his Interest, and so come in Supply of his Interest to make the Mortgage good. And if a Person that hath Power to charge Lands for a Sum of Money, do for the like Sum convey Lands to another, and covenant to make further Assurance (as here,) Equity will compel him to execute his Power to the Benefit of the Person from whom he hath received the Money. And the Defendant was Heir to Sir Nicholas and his Father, and bound by their Covenant to farther Assurance.

Whether if a Man that hath Power only to charge Lands, conveys them for so much as he hath Power to charge them, shall Equity inforce him to execute his Power to the same Person?

Whereunto it was answered by the Defendant's Counsel, That the Defendant does not claim as Heir to his Father or Grandfather, but by the Settlement; and that he was Heir Male of the Body of his Father, and was within the Consideration of the 2500 l. Portion which the Grandfather had, and which belong'd to the Father; and however, if that Settlement had not been made, the Defendant was Issue in Tail by the Settlement made by Edward Kemis's Will. And it was farther insisted, That the Settlement, by which Sir Nicholas had Power to charge the Lands, was discharg'd by the Mortgage, he having conveyed all his Interest out of him thereby, and that so he was disabled to execute his Power after. And it was also insisted for the Defendant, That Equity

in this Caſe ought to follow the Law, the Defendant claiming by precedent Title to the Plaintiff in ſuch Manner, that there was no Equity to bind it farther than by Law it is bound; and in Truth it did appear (howbeit it was not found in the Special Verdict) that Sir Nicholas did, after the Mortgage to the Plaintiff's Father, in purſuance of his Power, charge the Premiſſes with 2000 l. Debt which he owed, which Debts the Defendant's Father paid accordingly.

The Lord Keeper conceived the Power was not deſtroyed by the Mortgage, becauſe it was by Leaſe and Releaſe, and not by Fine or Feoffment. Yet both he and the Maſter of the Rolls were of Opinion that the Plaintiff could not be relieved in Equity. Nevertheleſs, at the Plaintiff's Importunity, he directed a Caſe to be made, and after Michaelmas Term, 1668. he diſmiſs'd the Bill.

Where a Power to charge Lands ſhall be deſtroy'd by the Conveyance of him that hath the Power, and where not.

The Lord Keeper.
Juſtice Tirrel.
Juſtice Rainsford.

Haynes *and others, Executors of* Smithby, *againſt* Harriſon *and others, Farmers of the Cuſtoms.* May 19.

On a Demurrer to a Bill of Review.

THE Bill was a Bill of Review to reverſe a Decree made by the Lord Chancellor Hide, for that by that Decree all Intereſt due on ſeveral Securities by Bond and Judgments, and Coſts at Law, ſuffered before the firſt Bill in ſuing thoſe Securities, were taken away, upon a Pretence that the Money lent the Defendants by the Plaintiffs Teſtator was paid by them to the King in Conſideration of the Farm of the Cuſtoms, which they did not enjoy: whereas their Teſtator was not concerned in the Bargain; and if diſpoſing Money by the Borrower, and any Accident befalling it afterwards, ſhould create an Equity againſt the Creditor, it would deſtroy all Commerce. And by the Courſe of the Court, which is the Law of the Court,

Where Payment of leſs than due on a Bond ſhall be apply'd to diſcharge the Principal, or the Intereſt only. See 1 *Vern.* 24, 34, 468. 2 *Vern.* 606, 607.

Errors aſſigned.

Where Intereſt is due on a Bond, and the Debtor pay any Sum leſs than the Intereſt, the Payment is accounted Intereſt only.
2 *Vern.* 606, 607.
1 *Vern.* 24, 34, 468, 9.

where Intereſt is due on a Bond, and the Debtor pay any Sum leſs than the Intereſt, the Payment is to be accounted Intereſt only; yet the Decree allows ſuch Payments (altho' they were much leſs than the Intereſt then due) for Principal. And the Court hath alſo taken away the Plaintiffs Coſts at Law, tho' by the Decree 800*l.* is ſtill due to the Plaintiffs on legal Securities, and the Proceedings and Coſts at Law were before any conſiderable Part of the Principal was paid, taking the Intereſt for the Principal, as the Decree doth; ſo that the Proceedings were legal, and without thoſe the Plaintiffs Teſtator could not recover his Debt, and ſo ought to be allowed thoſe Coſts.

The Defendants demurred, and inſiſted, That there is no Error in the Body of the Decree, nor new Matter to reverſe it, and inſiſt that this Court ever had a Power upon Circumſtances to relieve againſt Penalties, Judgments and Executions, and to abate and moderate, and ſometimes diſcharge Damages and Coſts; and it was inſiſted it had exerciſed ſuch Power in the Lord Keeper Coventry's Time.

Intereſt upon a Debt due by Specialty, and Coſts at Law, may upon Circumſtances be taken away in Equity.

And the Court did declare this Court had a Power upon Circumſtances to abate and moderate Coſts and Intereſt, and ſometimes to diſcharge them; and they muſt take the Decree as they found it, whereby it appears Smithby's Debt was ill made up, and that the Farmers became bound in Conſideration of the Farm, which they did not enjoy, and Coſts are in the Diſcretion of the Court; and Coſts diſcharged there, becauſe there was no Oppreſſion. And ſo the whole Court declared they could not go out of the Decree, and ſaw no Cauſe to reverſe it, and ſo diſmiſs'd the Bill.

Note the Rule laid down in 2 *Vern.* 606, 607, *Quicquid ſolvitur ſolvitur ſecundum modum ſolventis.* But it is to be obſerved with this Proviſo, *i. e.* That the Party paying at the Time of Payment declares on what Account he pays it: But a Declaration after is not ſufficient; as *A.* is indebted by Articles, and alſo on ſimple Contract, and pays ſeveral Sums, and enters them in his Book as paid on the Articles; yet this Entry is not ſufficient to apply it ſo. See 1 *Vern.* 24, 34, 468, 9.

Debated in the House of Lords.

DE
Term. Sanct Trin.
Anno Regis 20 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
Chief Baron Hale.

Cuthbert Morley, *Esq*; *againſt* Jerome *and* Henry Elways. June 1.

THE End of the Plaintiff's Suit is to have the Redemption of a Mortgage, made by the Plaintiff and his Father, James Morley, Esq; in December, 1641. to Jerome Elways, Father of the Defendants Jerome and Henry. Againſt the Plaintiff's Relief, the Defendant ſet up a Releaſe made by the Plaintiff in 1646. of all his Equity of Redemption, and a Decree made by the Lord Chancellor Hide in this Cauſe in 1663. which Decree is penned as if made by Conſent. This Decree being ſigned and inrolled, and the Plaintiff not able to perform the ſame, could not have a Bill of Review; nor could he be relieved by ſuch Bill, if it had been brought, the Releaſe barring all his Pretences, and that being upon a ſecret Truſt, he could not prove the

Releaſe of Equity of Redemption. *Vide ant.* 102.

Debated in the House of Lords.

Truſt poſitively, the Witneſſes being dead, and ſo he was not relievable neither in Law nor Equity. Whereupon the Plaintiff and Baron Greenvil, Eſq; petitioned the Lords Houſe the laſt Seſſions of Parliament for Relief againſt the ſaid Decree and Releaſe. The Cauſe held many Debates at the Bar of the Lords Houſe before Chriſtmas, 1667. the great Queſtion being, Whether the Releaſe was made in Truſt, or bona fide for a valuable Conſideration? The Proofs offered to evidence the Truſt were circumſtantial, and not direct poſitive Proofs.. One Thing offered by the Plaintiffs to evince the Truth of their Aſſertion to their Lordſhips in affirming the ſame to be only a Truſt, was, That their Lordſhips would pleaſe to conſider what Debts were due from the Plaintiff or his Father to the Defendant when the Releaſe was made, and with that to take Notice of the Value of the Eſtate releaſed at the Time of the Making thereof. As to the Reading the Proofs to both theſe, the Parliament being to adjourn in two Days, and there not being Time, their Lordſhips adjourned the Conſideration of theſe two Things, and reading the Proofs to the Value of the Eſtate, deſiſted until their next Meeting after Chriſtmas.

The Lord Keeper preſent thus far.

But the next Meeting after Chriſtmas, the Lord Keeper being abſent, the Lord Privy Seal ſat on the Wool-pack, and the Cauſe had two Days hearing when all the Plaintiffs and Defendants Proofs were read to the Values; and the Houſe, after ſeveral Days Debate of the Matter, being ſatisfied that by the Proofs it clearly appeared that the Value of the Lands was much greater than to make a Satisfaction for the Debt for which it was releaſed, did adjudge the ſaid Releaſe to be a further Truſt to pay 80l. per Annum to the Comptroller for Life, and ſet aſide the Decree aforeſaid, and referred the Cauſe back to the Court, to proceed as in the Caſe of an equitable Mortgage, which their Lordſhips adjudged this to be.

Lunæ, primo Junij, 1668. This Cauſe was heard in Court, when a Decree was made for the Defendants to come to an Account, and the Plaintiff to be admitted to the Redemption of his Eſtate. The ordering Part is as followeth:

First, That Jerome Elways come to an Account for all the Profits of the Lands in question, which he or his Father, or any other to his or their Use, or by their Direction or Appointment, have, or might without their own wilful Default have received. That Sir William Glascock should take the Account; but with this Direction, that in case the Lands mortgaged in Fee were not a sufficient Security for the Money due to the Defendant's Father, and for which he now stands engaged for them, and the Pre-engagement that was thereupon at the Time of the Defendant's Father's taking the Sequestration over, and besides the other Lands mortgaged, in which at the Time of the Defendant's Entry, and the Release made, the Plaintiff had only one Estate for Life, that then the Defendant shall be charged in the Account no more for the Lands held for the Plaintiff's Life, than the Master shall really judge them to be worth, without respect to the Benefit that hath happened by the Continuance of the Plaintiff's Life.

A Mortgage for an Estate for Life on an old Mortgage shall not account for more than the Estate had been worth to be sold. Vide ant. 3, 29, 68, 102. post. 119.

The Plaintiff grieved with this Direction, procured a Rehearing by the Lord Keeper, assisted with the Lord Chief Justice Vaughan, and Chief Baron Hales, and they confirmed this Order, and that in respect of the Contingency of the Estate, and not for what was made, the Mortgage being above twenty Years old.

For the Plaintiff it was insisted, That this was a new Direction without a Precedent; and that it was safer to judge what was, than what might have been; and that at this rate the Western Estates would not be mortgageable.

The Plaintiff by Petition complained of this Direction to the Lords in Parliament, and upon a solemn Hearing at the Bar of the House he was relieved, and the Lord Keeper ordered to direct the Mortgagee to account for the whole Profits of the Estate for Life, as in the Case of other Mortgagees.

Yet upon Appeal in Parliament ordered otherwise.

Baron

Baron Turner.

Delamere *againſt* Smith *the Executor of* Smith.

Whether, when a leſſer Sum is agreed to be accepted at preciſe Days in lieu of a greater, If he that is to pay, fails in Payment at thoſe Days, he ſhall not have any Benefit by that Agreement. See *New Caſes in Law*, 56, 57.
1 *Rol. Abr.* 29.
3 *Co.* 22.
5 *Co.* 52.
2 *Cro.* 504.
Cro. Eliz. 113.
poſt 183.

THE Plaintiff having had great Dealings with Smith the Teſtator, for Malt and other Things bought by the Plaintiff, by that means he became indebted to the Defendant's Teſtator in ſeveral great Sums, for which he gave him Security by Mortgage, Bond and otherwiſe.

Afterwards the Plaintiff became a great Loſer by the Badneſs of the Malt he bought of the Defendant's Teſtator, and other Accidents, and thereupon Smith and he came to a new Agreement, That in Conſideration of 80 l. lately before paid, and of 70 l. paid on the Plaintiff's Behalf, by one Tubbing the Plaintiff's Father-in-law, and of 40 l. more promiſed by Tubbing at a ſhort Day, That if the 40 l. were paid accordingly, that then if the Plaintiff ſhould pay Smith 800 l. in four Years by 200 l. per Annum, that the ſaid Smith would deliver up the Plaintiff all his Securities, &c.

The Money was all paid to Smith the Teſtator but 104 l. tho' not at a preciſe Day: So to have thoſe Securities up upon paying what was unpaid upon the laſt Agreement, with Damages from the Time it ſhould have been paid, is the Scope of the Bill.

In this Caſe it was inſiſted for the Defendant, That where a greater Sum is due by Specialty, and a leſs agreed to be taken for it, to be paid in certain Sums at certain Days, if the Agreement be not ſtrictly purſued, and the Monies paid preciſely at thoſe Days, but Part of the Money paid at other Days, a Court of Equity ought not to oblige him that made that Agreement (in Favour of the Perſon failing to perform it) to ſtand to it upon Payment of ſo much as will make up the Money paid ſince the laſt Agreement, with Damages for the ſame, from the reſpective Times the ſame ſhould have been paid by that Agreement, to the Times the ſame were paid, and Damages for what remains unpaid, till the ſame be paid. But if the Plaintiff would have any Benefit by the Agreement, he ought literally to have per-

performed it, which was in his favour, and without any Penalty; and therefore insisted that the Plaintiff was not to have any Benefit by that Agreement.

Ant. 92. *Post.* 301. 2 *Chanc. Cases* 1.

The Baron ordered this Matter to be made into a Case; but as yet nothing done therein. And it is to be observed in this Case, that Part of the Consideration of the Agreement was, That Tubbing (who was not obliged by any former Security) had paid Smith 70l. and undertook to pay him 40l. more; so Smith bettered his Security, &c.

Degg *against* Osbaston.

THE like Case with that of Hen and Conisby, ant. f. 93. and upon solemn Debate ruled as that was. And in both these Cases the Mortgagee was ordered to take his Principal without his Interest; and Time was given for Payment of the Principal, (viz.) a Year's Time.

Money paid in by the Borrower to the Scrivener, no good Payment to conclude the Lender. *Vide ant.* 93, 94, 99, &c. *ibid.* See also 2 *Chanc. Ca.* 77, 227 and 242. 1 *Vern.* 150. 2 *Vern.* 197, 265, 539, 606, 607.

DE

DE
Term. Sanct. Mich.
Anno Regis 20 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Sir Geoffry Palmer, *the King's Attorney General, on the Behalf of* Jerome Smith, *a Lunatick, againſt Sir* Robert Parkhurſt *and others.* Octob. 26.

Inquiſition of Lunacy, &c. traverſed, *vide poſt.* 153. 1 *Vern.* 9, 105, 155, 262, 263. 2 *Vern.* 192, 414.

THE Bill did ſuggeſt, That by Inquiſition taken before the Mayor of London, by Virtue of a Writ to him directed, the ſaid Jerome Smith was the 23d of June, 1664. found a Lunatick, and had lucid Intervals, and had not ſufficient Government of himſelf, his Lands and Goods; and that he was Lunatick the laſt of June, 1647. and during his Lunacy he had ſeveral Sums of Money due to him, which he had waſted, and alienated divers Goods, but to whom the Jurors were ignorant. And did charge, That one Archibald owed the Lunatick, during his Lunacy, 1300 l. by good Security; and that in 1656. the Defendant cauſed the Lunatick to aſſign Archibald's Debt to him, and had received the ſame upon colour of a Satisfaction given to the Lunatick for the ſame, whereas that pretended Satisfaction was not valuable, and was done in Prejudice of the Lunatick. And to have an Ac-

count of the 1300 l. and to be relieved was the Scope of the Bill.

The Defendant ſets forth by Anſwer, That he ſold the ſaid Jerome Smith in 1656. a Manor, which he much deſired to buy at 1200 l. it being the Place of his Birth; Jerome Smith aſſigned Archibald's Debt for to ſatisfy himſelf the Purchaſe-Money, and pay the Overplus to Smith, which he did, and did convey the ſaid Manor to Smith, and inſiſted that Smith was not a Lunatick at that Time, but did uſually buy and ſell, &c.

A Bargain by a Lunatick eight Years before the Lunacy found, avoided by being found a Lunatick, with a Retroſpect of ſeventeen Years.

This being the Nature of the Caſe, it came firſt to be heard before Juſtice Tirrel, who although it did appear that the Defendant had conveyed the ſaid Manor to Smith for the ſaid 1200 l. and that Smith did at that Time uſually barter, and was not found a Lunatick till eight Years after, with a Retroſpect of ſeventeen Years, did order the Defendant to account for the 1300 l. being Archibald's Debt, and to ſatisfy the ſame with Damages, without any Proviſion for the Defendant's having the Manor again, or account for the meſne Profits. And though it was ſtood upon at the Hearing, That in Caſe of a Lunatick (where the King hath no Intereſt in his Eſtate, but as Pater Patriæ commits him to another to manage it for him, the Lunatick, in caſe he recover his Senſes and Wits, ſhall have his Eſtate again; and if not, it will go to his Adminiſtrators) the Lunatick himſelf (as in the Caſe of an Infant) ought to have been a Party; yet that Opinion was over-ruled by the Judges, and by the Lord Keeper on a Re-hearing. But the Lord Keeper did ſtay the Paſſing the Decree, and gave Liberty to the Defendant to traverſe the Inquiſition.

Yet the Party admitted to traverſe the Inquiſition.

Note, That generally a Lunatick ought to be made a Party; but the Reaſon why it was over-ruled here, was, that he might ſtultify himſelf.

The Lord Keeper.

Carter *and others, Creditors of* Church, *againſt* Church, *alias* Weſtin, *and others.* Octob. 28.

CHURCH deviſeth ſome Part of his Lands and Tenements to his Executors to ſell for Payment of his Debts, and the reſt of his Lands he deviſed to marry his Daughter, in Fee, being then a Year old, and declares that his Executors ſhall receive the Profits of thoſe Lands until

Legacy on a Contingency veſted, though the Legatee dies before it happens.

Vide ant. 60. *Poſt.* 140, 198. & *prox. pag.*

Deviſe of Profits till a Child come to 21 Years, is a good Deviſe of a Term till the Child would be 21, tho' he die before.
1 *Vern.* 255, 326, 335, 462.
2 *Vern.* 417, 424, 466, 508, 673, 758, 766.

until his Daughter come to the Age of one and twenty Years, towards Payment of his Debts and Legacies. The Daughter died at five Years old. The Lord Keeper was of Opinion, that the Charging the Profits till the Daughter attained one and twenty (though ſhe died before) amounted to a Term till ſhe would have attained that Age, if ſhe had lived; and cited Boraſton's Caſe, 3 Cro. and a Caſe in Dyer, where Lands were given to a Mother for Education and Maintenance of the Daughter till eighteen Years old; the Daughter died before eighteen, yet adjudged a good Term to the Mother till ſhe would have attained eighteen had ſhe lived. And he ſaid that the principal Caſe was much a ſtronger Caſe.

The Lord Keeper.
Juſtice Windham.

Jacob Aſh *againſt* Gallen. November 18.

At Common Law, a Uſe on a Uſe will not ariſe by a Bargain and Sale. *Quære*, If it will be a Truſt in Equity.
Vide poſt. 242.

IT was declared, That a Uſe upon a Uſe will not riſe by Bargain and Sale, Dyer 155. and Chudley's Caſe. Co. Rep.

But for the Plaintiff it was inſiſted, that tho' a Uſe could not riſe as a Uſe upon a Uſe, yet as a Truſt it would in Equity. And a Caſe was ordered to be made, which was this:

Iſaac Aſh with his own Money bought Lands of 100l. per Annum, and took the Conveyance by Indenture in theſe Words; Grant, Bargain, Sell, Alien, Enfeoff, and Confirm to Iſaac Aſh, his Executors and Aſſigns; To the Uſe of Iſaac for Life; Remainder as to one Third to his Wife for Life; Remainder to Jacob Aſh and to his Heirs, (whoſe Heir the Plaintiff is) with a Letter of Attorney to make Livery. The Deed is acknowledged, and duly enrolled in Chancery. Two Months after Inrollment, Livery is made, and indorſed on the Deed. The Plaintiff and Defendant's Wife were both Grandchildren to Iſaac Aſh, who by Leaſe and Releaſe did convey the Lands in Queſtion, the one Moiety to the Plaintiff, and the other Moiety to the Defendants and their Heirs; and the Plaintiff did not except to this Diſpoſition in Iſaac's Life; which if he had, Iſaac would (as was inſiſted for the Defendants) have otherwiſe provided for

them, he having given every Grandchild to the Value of 50 l. per Ann. but the Defendants, to whom he gave nothing but the Moiety of the Premisses.

For the Plaintiff it was insisted, That Isaac intended to take the Estate by Feoffment, and that the inrolling of it first was only for safe Custody of the Deed; and that however the Uses upon a Use would not rise in Law, yet in Equity they were good by way of Trust.

Whether a Use upon a Use in a Deed inrolled be to be supported in Equity as a Trust. See *New Ca. in Eq.* 162 to 166, 182, &c. 2 *Vern.* 19, 28, 50, 106. 1 *Vern.* 108, 109, 226, 440, &c.

For the Defendant it was argued thus upon private Discourse of Counsel, That Isaac having by the Deed an Election to take it either by Feoffment (which if he did, it would not be in his Power otherwise to dispose it) or by Bargain and Sale, whereby he might have Power to dispose the Estate as he pleased; and he having elected to take it by Inrolment, and disposed the same by Act executed in his Life, it was apparent he intended to take it so as to dispose it, and therefore no Reason in Equity to make any other Operation of this Conveyance than the Law made.

There was some Diversity of Opinion amongst Counsel touching this Case; but the Parties agreed among themselves, and it was not argued at all.

The Lord Keeper.
Justice Twisden.

Read *against* Read. November 25.

The Nature of a Writ of *Ne exeat Regnum.* See 2 *Chanc. R.* 19, 20. *S. C. Curse. Canc.* 49, 454. 2 *Salk.* 702.

The Lady Read, Wife of Sir John Read, had by Petition got a Ne exeat Regnum against her Husband, upon Suggestion that she having gotten a Sentence for Alimony against him in the Spiritual Court, he refused to obey it, and in Avoidance of it threatned to go beyond Sea.

The Husband moved for a Supersedeas of this Writ, and Whether it lies in this Case? was the Question.

For the Husband it was said, That every Man may travel where he will, unless he be prohibited by the King's Writ, Dyer 296. This Writ is a Prerogative Writ, which the King may use as he hath the Care of his People, 2 Inst. 54. A Writ de Securitate invenienda, not to go beyond the

Seas, lies not againſt a Layman, but a Clergyman only, qui habet Curam Animarum, and they are to maintain the Laws of the Church, which if they went beyond the Seas, they might adhere to the Pope, and they have no Temporal Eſtate to oblige them to ſtay here; and this Writ ought to be indorſed Patronus ſequitur hoc Breve; but in this Caſe no Patron, no Clergyman. 19 Jac. in the Caſe of Welby and Stevens, at the Suit of his Creditors, which were many, there this Writ was granted; but a Bill was filed, and none here. Criſp againſt Biſhop, 15 Car. 2. The Writ granted upon Suggeſtion he was indebted; but on putting in Security, it was ſuperſeded.

On the other ſide, for maintaining of the Writ, and on the Behalf of the Lady, it was ſaid, The King may reſtrain a Subject from going out of the Realm, Knowls againſt Luce, Moor 109. Selden's Janus Angliæ 92. ſaith, It extends tam Laicis quam Clericis. There is no other Writ but this; and if this go not to a Layman, then there is no Writ to a Layman. It's true, all Writs in the Regiſter are Clericis; but that's but an Addition. The Ground of the Writ is, That a Perſon is going beyond Sea to the Prejudice of the King; and the Writ is to give Security not to go 'till the King licenſe him. Leigh againſt Bever, 9 Jac. A Precedent, 9 Car. 1. Mead's Caſe, a Ne exeat Regnum awarded for a private Matter. Hill. 52. Boyl againſt Slugborough, it was a Queſtion, Whether this Writ was grantable at the Suit of a private Perſon?

A *Ne exeat Regnum* lies for a private Matter without a Bill.

But the Court reſolved this Writ well lies in the principal Caſe, and will not ſuperſede it.

Touching this Writ of *Ne exeat Regno*, ſee *Curſus Canc.* 454, 455, 466. 2 *Salk.* 762.

The Lord Keeper.
Chief Baron Hales.
Juſtice Archer.

Dame Margaret Pridgeon, *Relict of Sir* Francis Pridgeon, *againſt the Executors of Sir* Francis Pridgeon *in Truſt for* Robert Pridgeon, *&c.*

AFTER ſeveral Debates on both Sides before the Lord Keeper, this Cauſe came to be further heard by him in Novemb. 1668. aſſiſted with the Lord Chief Baron Hales and Judge Archer. And the Caſe was thus:

The Plaintiff being a Widow, at her Marriage with Sir Francis Pridgeon, ſuggeſts an Agreement precedent to the Marriage between him and her, and others on her Behalf, That notwithſtanding her Marriage, the Rents and Profits of all her own Eſtate, and what Perſonal Eſtate and Goods ſhe had, ſhould be at her own Diſpoſe; and that ſhe was poſſeſſed of certain Goods, &c. before her Marriage with him, which the Defendants, the Executors of Sir Francis, claimed as being his Executors in Truſt for the ſaid Defendant Robert, his Nephew and Heir, which by the ſaid Agreement ſhe claimed.

Agreement between Husband and Wife before Marriage extinguiſh'd by Marriage. *Ant.* 21. 2 *Vent.* 343. 1 *Vern.* 408.

For the Defendants it was inſiſted, That if any ſuch Agreement were with Sir Francis before the Marriage, it was extinguiſhed by the Marriage; and ſo cited Smith and Stafford's Caſe, Hob. 216. and the Earl of Suffolk and Greenvil's Caſe; and inſiſted, Such-like Agreement ought not to be countenanced in Equity, being derogatory to the Rights and Privileges of Marriage. And on the debating the Matter of this Cauſe, a Caſe between Scot and Brograve, about 1639. in this Court, was cited, which was thus:

This Caſe of the E. of *Suffolk* was in the Commiſſioners Time.

Scot againſt *Brograve* about 1639.

The Wife of an unprovident Husband had, unknown to him, by her Frugality raiſed ſome Monies for the Good of their Children, which ſhe had diſpoſed for that Purpoſe, being otherwiſe unprovided for; and this Diſpoſition of the Wife the Lord Coventry had eſtabliſhed by a Decree. But afterwards, upon a Review, and Aſſiſtance of the Judges, this

The Wife may not be ſuffered, though to good Uſes, to diſpoſe of any Money ſhe hath rais'd out of her Huſband's Eſtate by Frugality.

Gorges againſt *Chancy, Mich.* 1639.

A Diſpoſition by Feme Covert of Monies raiſed out of ſeparate Maintenance, good againſt the Husband.

this Decree was reverſed, as being dangerous to give a Feme Power to diſpoſe of her Husband's Eſtate. And another Caſe between Gorges and Chancy, which was about Michaelmas-Term 1639. was cited, which was to this Effect:

Baron and Feme by Agreement ſeparated and lived apart, and agreed that the Wife ſhould have 150 l. per Ann. ſeparate Maintenance, out of which ſhe had ſaved ſome Money, and put it out to Intereſt, and took Bonds in a Friend's Name, and diſpoſed the Money by Will; and this upon Debate was eſtabliſhed a good Diſpoſition; and this was now declared to be a juſt Order.

But note, That in this Caſe it was an Agreement after Marriage with Friends in the Behalf of the Wife for a ſeparate Maintenance: But in the principal Caſe the Chief Baron declared, That though where an Agreement is between Baron and Feme before Marriage, that the Wife may by Will diſpoſe of Part of her Eſtate, or for a Thing which is future to the Marriage, ſuch an Agreement is not diſſolved by the Marriage; yet where an Agreement is to have Execution during the Coverture, as in the principal Caſe, there the Marriage extinguiſheth ſuch an Agreement. And the whole Court concluded the Plaintiff had no Ground for Relief; and declared ſhe had no Cauſe of Suit but by way of Anticipation; for the Executors did not claim the Goods, but ſhe feared the other Defendant, the Infant, for whom they were Executors in Truſt, would claim the Goods, &c. Yet the Court declared, That they would farther conſider the Matter, and the Cauſe hath not yet received any farther hearing.

Where the Truſt of a Term is, before Marriage, aſſigned with the Husband's Privity, for the Benefit of the Wife, he cannot diſpoſe of it. 1 *Vern.* 7, 8. *contra*, if aſſigned without his Privity. *ibid.* 18.

Alſo Money in Truſtees Hands for Benefit of a Feme Covert, ſhall go to her if ſhe ſurvive, and not to the Husband's Executors. *ibid.* 161.

But a Sum of Money awarded to the Husband, to which he is entitled in Right of his Wife, will go to his Executor, and not ſurvive to the Wife. *ibid.* 396. *Vide ibid.* 408.

DE
Term. Sanct. Hill.
Anno Regis 20 & 21 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Goddard *againſt* Complin. January 27.

TEnant in Tail demiſeth his Lands for Ninety-nine Years by way of Mortgage, and after marries; and in Conſideration thereof, and of 500 l. Portion, ſuffers a Recovery, to enable him to ſettle a Jointure, and afterwards takes up more Money of the Mortgage upon the former Security. The Jointreſs was Plaintiff, and the Queſtion was, Whether the Defendant ſhould be allowed Money lent after the Recovery and Marriage?

And the Court declared, That if the Defendant had no Notice of the Jointure when he lent the new Money, he muſt be allowed it.

Where a Mortgagee lent new Money on his old Security without Notice of an intervening Settlement, ſhall be allow'd it. *Hard.* 173, 318. 1 *Vern.* 49, 294, 187, 335, 464, 476. 2 *Vern.* 29, 30, 160, 66, 81, 157, 159, 271, 304, 524. *Ant.* 109. *poſt.* 162.

Another Queſtion was, Whether the Defendant had proved Payment of the Money ſuppoſed to be lent? And as to that, there was the Receipt in the Deed of the Mortgage, the Condition of Redemption on Repayment of the Money, and the Defendant's Oath that he had paid it, which was inſiſted

What is good Proof of Payment of Money againſt a Purchaſer.

inſiſted on, was Evidence enough of Payment after ten Years againſt any Perſon, and ſo the Court inclined.

But the Plaintiff ſtanding upon it, That it was not ſufficient Evidence as againſt the Plaintiff, who claimed as a Jointreſs, there was farther Evidence.

A Recovery ſubſequent to a collateral Purpoſe, ſhall enure to make good precedent Eſtates. Ant. 49, 85.

There was alſo this Queſtion put: Tenant in Tail mortgageth for Years, and afterwards upon Marriage in Conſideration thereof ſuffers a Recovery to ſettle a Jointure, *&c.* Whether this Recovery ſhould enure to make good the Mortgage, it being deſigned for the Marriage-Settlement only? Which was anſwered. If no Recovery had been, there could have been no Jointure; and the Jointreſs could not have avoided the Mortgage; and ſhe is in by the Act of her Husband, and no ſubſequent Act of the Husband could avoid his own Act precedent. And it was alſo declared, That if Tenant in Tail confeſs a Judgment, &c. and ſuffer a Recovery to any collateral Purpoſe, that Recovery ſhall enure to make good all his precedent Acts and Incumbrances.

The Maſter of the Rolls.

Collet *againſt* Jaques. February 8.

Rent and Arrears of it decreed (the Deed being loſt) becauſe it did not appear what Kind of Rent it was.

Latch. 24, 146. *Ant.* 78.

THE Bill was for 3 l. for a Rent of 5 s. per Annum, Arrear for twelve Years. The Plaintiff ſuggeſted, That the Deeds by which the Rent was created were loſt, and alſo the Rent for the future; and there was Proof of a conſtant Payment of it till the laſt twelve Years. And the Maſter of the Rolls decreed the Defendant to pay the Arrears and growing Rent, becauſe he ſaid it was uncertain what Kind of Rent it was, and ſo no Remedy at Law; and here the Perſon is made liable for the Rent, which for ought appeared he was not at Law.

Of Rents, Reſervations, *&c.* *vide ant.* 32, 79, 80, 84, &c. *poſt* 147, 126, 146, 185, 261, 269, 273. *New Caſes in Equity* 21. 3 *Chanc. Rep.* 11, and 102 to 149. 1 *Chan. Rep.* 5, 62. 2 *Chan. Rep.* 61.

The Maſter of the Rolls.

Duncumban, *an Infant*, *againſt* Stint, *Executor of* Stint. February 1.

THE Defendant's Teſtator gave the Plaintiff 1000l. to be paid at the Age of twenty-one Years.

The Bill ſuggeſted the Defendant waſted the Eſtate, and prayed he might give Security to pay this Legacy when due; and the Maſter of the Rolls did accordingly decree the Defendant to give Security.

An Executor decreed to give Security for a Legacy. *Ant.* 98. *poſt.* 286. 1 *Vern.* 455.

The Maſter of the Rolls.

Eaton-College *againſt* Beauchamp *and* Riggs. February 5.

THere was a Rent or Penſion of 1 l. 14 s. per Annum, granted by King Hen. 6. to that College, iſſuing out of Lands. Riggs was Executor of the Ter-tenant, and to be relieved for the Arrears of Rent incurred in his Teſtatrix's Life-time was this Bill brought, which did ſuggeſt, That the College did not know the Lands out of which the Rent went, and ſo would not diſtrain. Beauchamp was the preſent Ter-tenant; and though the Perſon of the Ter-tenant was not chargeable with the Rent at Law, but only the Land by way of Diſtreſs; yet, foraſmuch as the Teſtatrix held the Land, and did not pay the Rent, it was ſaid, That thereby the perſonal Eſtate of the Teſtatrix was augmented. And ſo the Maſter of the Rolls decreed the Executor to pay the Arrears, as far as he had Aſſets of the Teſtator's Eſtate.

An Executor decreed to pay Arrears of Rent which the Teſtator's Perſon was not liable to. See *Max. Eq.* 20. *Ant.* 80. *poſt.* 271. 2 *Chan. Ca.* 84. 1 *Vern.* 309.

The Lord Keeper.
Juſtice Tirrel.
Juſtice Moreton.

Slingsby *againſt* Hale. February 14.

On a Demurrer.

Bill of Review of a Decree made twenty Years paſt. See 1 *Vern.* 131, 135, 441, 166, 264, 287, 292, 417, 441.

THE Bill was a Bill of Review to reverſe a Decree made about twenty Years ſince, wherein the Mortgagor being Plaintiff againſt the Mortgagee to have a Redemption, it was decreed accordingly, paying the Money to be found due on Account; and for that Purpoſe referred to a Maſter to take the Account. And it was alſo decreed, That if the Plaintiff failed to take the Money at a Day to be ſet by the Maſter, the Defendant ſhould hold diſcharged of all Equity of Redemption.

Pending the Reference the Suit abated by the Death of one of the Parties Defendant; yet the Account went on, without any Notice taken to the Court of the Abatement; that the Executor being a Defendant to the Original Bill, the Maſter was attended on the Behalf of both Sides, and made up his Report, and that confirmed and decreed, and that Decree enrolled near twenty Years ſince. And now the Plaintiff being Deviſee of the Mortgagor, by Bill of Review aſſigns theſe Errors, and now excepts againſt the Decree.

Firſt, For that in reſpect of the Abatement, there was no Cauſe in the Court when the Account was ſtated, and the Decree drawn up and inrolled.

Secondly, That it was Error for the Court to make a Decree for the Defendant to hold free of Equity of Redemption on the Plaintiff's Bill.

Proceedings after an Abatement decreed and inrolled, no Error or Cauſe of Reverſal. 1 *Vern.* 166, 417, 441. 2 *Vern.* 120.

The Demurrer was, in nullo Erratum, and the Plaintiff not intitled to a Bill of Review.

To the firſt it was anſwered, It was only an Exception in Point of Form, and not in Point of Right; and that the Account being ſtated and ſettled, ought not after ſuch Length of Time to be let looſe or travelled into; and as to

this Point cited the Case of the Lady Cranbourn and Mr. Dalmahoy.

And as to the second, it was said, That Circuity of Action is to be avoided, and that there were many Precedents of Decrees in this manner for the Defendant; and that what was decreed for the Defendant was most just, and could not be denied upon the account of Justice.

And the Court declared they saw no Cause to alter the Decree; and so allowed the Demurrer, and dismis'd the Bill.

After a Complaint of this in the Lords House, the Matter of the Demurrer was re-heard March 9, 1670. by the Lord Keeper, Chief Justice Hale, and Vaughan; and on long Debate they seemed to incline against the Plaintiff, but took Time to consider. And after, 21 July, 1671. they all three deliver'd one uniform Opinion clearly, That the Plaintiff being Devisee, is not entitled to a Bill of Review, being not in Privity to the Testator, against whom the Decree was: as, if a Judgment be against Land, and the Owner aliens the Land, the Alienee cannot bring a Writ of Error, nor the Vendor. And so dismiss'd the Bill for this Reason principally. Yet the Keeper and Chief Justice Hale were of Opinion that the Error assigned was no sufficient Error to avoid the former Decree, but notwithstanding the Abatement the Account ought to conclude, and stand as an Account stated.

A Devisee cannot maintain a Bill of Review, because he is not in Privity. Vide ant. 37, 150.

Justice Wyld.

Weymberg *against* Touch. February 24.

On a Demurrer.

THE Bill was, to be relieved against an Action of Debt for Money due to the Defendant as a Merchant from the Plaintiff, for Wares sold in Denmark. The Equity was, That in the Time of Hostility between that Crown and this, the Defendant being a Subject to this Crown, the Plaintiff was forced to pay the Money he owed the Defendant to Commissioners authorized in that Behalf to the King of Denmark; And that by the Articles of Peace between the two Crowns it was agreed, That all Monies

Where Articles of Peace between two Crowns can discharge a Subject's Debt, *vide Post.* 173.

ſo exacted from each others Subjects ſhould be compenſated by ſetting one againſt the other; and that the Parties that paid the Money to either of the Kings Orders, ſhould be diſcharged againſt the Creditor.

To this Bill the Defendant demurred, and inſiſted there was no Equity; and that if the Articles did bind private Perſons, they were as good at Law as here; but at Law they did not bind, for the Defendant had a Verdict.

Chancery a Court of State.

For the Plaintiff it was inſiſted, That the Chancery was a Court of State; and that the Articles of Peace were inrolled there; and that the Bill was, to have Witneſſes examined beyond Sea. The Judge ordered the Defendant to anſwer.

Of the Power, Authority and Juriſdiction of Chancery, *vide ant.* 56, 92. *Poſt.* 201, 203, 205, 156, 221, 228. *New Caſes in Equity*, 95, 109. 1 *Vern.* 54, 58, 131, 212, 292, 265. 2 *Vern.* 47, 484, 494. 1 *Chanc. R.* 70, 86, 92, 217, 140, 278. Note *poſt.* 228.

The Lord Keeper.

Marah More *againſt* Nicholas Grice *and others.*

Covenant to ſtand ſeized in Truſt for a *Jointure*, &c. See 1 *Chan. R.* 5, 46. 3 *Chanc. R.* 186.

THE Plaintiff Marah's Mother was Siſter of the Defendant Grice; and by Articles of Agreement made between Thomas More the Plaintiff's Father, and Nicholas Grice the Defendant (in Behalf of his Siſter the Plaintiff's Mother) it was agreed, That in Conſideration of 800 l. agreed to be given with the Plaintiff's Mother in Portion to the Plaintiff's Father (whereof 600 l. was Nicholas's own free Gift) That the ſaid Nicholas ſhould ſtand ſeized in Truſt of the Lands in queſtion, as a Jointure for the proper Uſe of the Plaintiff's Mother for and during her natural Life, the Remainder to the Iſſue of her Body (which the Plaintiff only is) the Remainder to the right Heirs of Thomas More. Theſe Lands were in truth mortgaged by More before, and the Defendant did pay him 500 l. of the Portion, and was wrought upon by him to deliver up the Articles, and for 5 l. to releaſe to More the Lands; and More and his Wife had by Deed and Fine ſold the Lands away; and ſo to be relieved againſt the Breach of Truſt was the Intent of the Bill.

And for the Plaintiff it was inſiſted, That the Defendant ought to make good to the Plaintiff the Value of the Lands ever ſince her Mother's Death, who died about twenty Years ſince, and the full Value of the Lands, if to be ſold (by the Agreement the Lands being to come to her immediately after her Mother's Death.)

But for the Defendant it was inſiſted, That if there were a Breach of Truſt, it was no ill Intent in him, nor any thing to his Benefit, but to comply with the Neceſſity of the Plaintiff's Father, (who is ſtill living;) and if a Settlement had been made according to the Articles, it might have been ſo awarded, that he and his Wife might have prevented the Eſtate from coming to the Plaintiff. And they did after ſell the Lands by a Fine; and however the Plaintiff's Father, according to the true Meaning of the Articles, was to have had at leaſt an Eſtate for Life in the Lands: for it was abſurd to think that the Husband in Marriage ſhould ſettle his Lands on his Wife and her Iſſue, and exclude himſelf for Life; and being mentioned in the Articles, that the Wife ſhould have them for a Jointure, and after to her Iſſue, the very Word Jointure did imply that the Husband ſhould have an Eſtate for his Life as well as the Wife, and that was the uſual way of ſettling Jointures for Life on the Husband, and then in Remainder to the Wife for Life. And it was ſaid, That if a Bill had been brought againſt More to compel him to make a Settlement according to the Articles, the Court would never have excluded him of an Eſtate for his own Life. And of this Opinion the Lord Keeper declared he was as to the Husband's Eſtate for Life, and that he ought to have the Premiſſes by Intention of Agreement for Life. And therefore, and inaſmuch as 600 l. of this Portion was agreed to be given by the Defendant as a free Gift of his own, and it was uncertain what the Value of the Lands might be after the Plaintiff's Father's Death, and there was 300 l. of the 800 l. unpaid, the Lord Keeper propoſed, That the Plaintiff ſhould have the ſaid 300 l. with Damages, and the Defendant to pay it her accordingly. And ſo it was decreed.

The Word *Jointure* in an Agreement, implies that the Husband ſhall have an Eſtate for Life as well as the Wife.
See 1 *Chan. R.* 5, 46. 3 *Chan. R.* 186.

Of Covenants to ſtand ſeized how expounded in Equity, *vide poſt.* 161. *New Caſes in Equity*, 162, 163, &c. 1 *Vern.* 40, 141. 2 *Salk.* 675 to 695.

DE

DE Termino Paſchæ,

Anno Regis 21 Car. II.

IN CANCELLARIA.

Hele *againſt* Stowel. May 8.

Baron and Feme. *Vide ant.* 81, 82. 1 *Salk.* 28, *&c.*

THE Husband deviſed his Lands to his Wife during the Minority of his Son, and dies, and hath only a poſthumous Son, and by his Will gives his Wife Power to make Leaſes to raiſe Money to pay Debts, &c. The Wife enters, and takes the Profits, and then marries a ſecond Husband, and he lives ſome Years, and takes the Profits, and dies, and the Wife continues to take the Profits of ſuch Part of the Land as ſhe had not let, for ſhe did let ſome Part according to the Will. This Son attains his Age, and proves a Revocation of the Will, and prays his Mother may account.

Where Rents taken by Colour of a Title that's avoided, the Receiver ſhall be accountable as a Bailiff. 1 *Salk.* 28.

Ordered, That ſhe ſhall account for all the Profits that her ſelf or her Husband took; and the Reaſon was, that ſhe ſhould be ſaid to take them 'till the Infant was fourteen Years of Age as Guardian, and after as Bailiff; and ſhe was to anſwer as to what her Husband took, as in a Devaſtavit; the Wife having no Notice of the Revocation, had paid Legacies charged on the Lands by Will.

Legacies paid by Colour of a Will, which is after found to be revoked, allowed. See 2 *Vern.* 209, 241, 495, 496, 680, 720, 742. 1 *Vern.* 23, 30, 97, 141, 182, 329.

Ordered, That ſhe be allowed thoſe. But as for the Leaſes ſhe had made, tho' they were for Fines and full Rents, tho' ſhe offered to account for the Fines and Rents, the Court would not make them good, becauſe the Mother could not ſet or let Lands.

The

The Lord Keeper.
Juſtice Rainsford.
Juſtice Wyld.

Holſtcomb *againſt* Rivers. May 10.

An Account reſted on fourteen Years is concluſive. See 1 *Chanc. Rep.* 146. *poſt.* 262, 299.

THE Defendant and one Collins were Factors for the Plaintiff in Spain before 1654. In that Year they ſent him to London on Account, and charged themſelves with divers Goods of the Plaintiff in ſpecie. In 1656. there happened an Imbargo on Engliſh Ships and Goods in Spain, and a Seizure of all the Goods in the Defendant's and Collin's hands, and on their Books, and the Defendant was caſt in Priſon on that Account, and the Bill was now to call the Defendant to an Account (Collins being dead) without making his Executrix a Party.

For the Defendant it was inſiſted, That by reaſon of the Seizure and Impriſonment he could not account, having loſt his Books, and never ſeen them ſince; and that the Plaintiff had been twice over with Collin's Executrix, and ſhe was no Party; and that after this Length of Time, it would be hard to draw the Defendant to an Original Account.

The ſurviving Factor is anſwerable for himſelf and Co-factor.

The Executor of the Co-factor firſt dying is accountable. *Ant.* 27, 30, 37.

Court. It was reſolved for Law, That (tho' inter Mercatores jus accreſcendi hath no Place) yet the ſurviving Factor was to account for what was made by himſelf or Co-factor; and yet it was agreed that in this Caſe an Account lies againſt the Executrix of the dead Factor. And ſo it was ordered, That, in reſpect of the Length of Time ſince the Account was ſent, and no clear Proof of any Exception to it till after the Seizure; and that when the Account was ſent over, the Plaintiff was writ to, to ſend his Exceptions ſpeedily, if any he had; that the Account ſhould not be ravelled into, but ordered the Defendant to account for, and ſatisfy what had been made by Sale of the Goods remaining in ſpecie in the former Account before the Seizure. But in regard of the Length of Time, and the Loſs of the Books, (which the Defendant had ſworn by his Anſwer) it was ordered, That the Defendant ſhould not be charged in this Account for more than according to his own Oath what

Where an Accountant having loſt his Papers by no Fault of his own, ſhall not be charged beyond his own Oath. *Vide* 1 *Vern.* 452. *Maxims of Equity* 8.

what was made, or he did remember or believe was made by the Sale of thoſe Goods. And with theſe Directions, it was referred to Merchants to take the Account, who made a Direction tending to draw a harder Direction from the Court upon the Defendant in the Way of his Accounting. Whereupon his Lordſhip appointed to re-hear the Cauſe, and the ſame was accordingly re-heard by him, aſſiſted by Mr. Juſtice Rainsford, and Mr. Juſtice Wild; and upon long Debate, the former Order was confirmed.

Prat *againſt* Colt. May 11.

On a Demurrer.

A Truſt of Lands no Aſſets. See 1 *Vern.* 172, 410, 411. 2 *Vern.* 248. *Ant.* 12 & 14. *Poſt.* 148, 257.

THE Plaintiff had a Judgment againſt George Holt, and brought his Bill againſt his Heir, to ſubject certain Lands which he had a Decree of this Court for, upon a Truſt for his Father and his Heirs to ſatisfy his Debt; and the Defendant demurred, and this Demurrer allowed: And the Lord Keeper conceived it all one with Bennet and Box's Caſe. But quære, ſince the Statute of Frauds and Perjuries.

And ſee 2 *Vern.* 248. That by the ſaid Statute, the Truſt of a Fee is Aſſets at Law, but not the Truſt of a Term; and ſo was an Eſtate *pur auter vie* before the Statute, if limitted to Executors. *ibid.* 720.

What are Aſſets in Equity?

Plantations in Fee beyond Sea, are Aſſets to pay Creditors. 1 *Vernon* 93, 348.
So are Lands in *Ireland*, to pay Bond-Debts here, (*aliter* of *Scotland*; *quære*). *ibid.* 419.
Quære, If Truſts in Fee-ſimple deſcended on Heirs, ſhall pay Bonds. *ibid.* 172.
So of an Equity of Redemption of a Mortgage in Fee. *ibid.* 411.
But an Equity of Redemption of a Mortgage for Years, is Aſſets *in Equity*. *ibid.* 410.
A Leaſe for Years, or a Bond taken in a Truſtee's Name, is Aſſets. 2 *Vern.* 764.
So a mortgaged Term, though it be no Aſſets at Law, yet liable to Debts in Equity. *ibid.* 54.
So a Patent of a Walk in a Chaſe, (or of a Fair, Market, &c.) *ibid.* 67.
So a perſonal Eſtate, though deviſed, &c. *ibid.* 248, 287, 319, 465.
Where a Reverſion of Lands in Fee are Aſſets in the Heir, *cum acciderit*. *ibid.* 134. *Vide* 763.
Of Aſſets by Deſcent in the Hands of the Heir. *Vide ibid.* 44, 61, 62, 182, &c. *ſupra*.

DE
Term. Sanct. Trin.
Anno Regis 21 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
Juſtice Twiſden.
Juſtice Wyld.
Juſtice Rainsford.

Vachel *againſt* Vachel *and* Lemmon. July 1.

A Limitation of perſonal Chattles to one for Life, with Remainder over, good in Equity. See 1 *Vern.* 35. 2 *Vern.* 345, 727.

TAnfield Vachel, by his laſt Will in Writing, deviſeth to the Effect following, (viz.) I give the Uſe of all my ſeveral Paintings, and Books of Print, my coloured Collection of Medals in Gold, Silver, and Braſs; all my rare Turnings of Ivory and Guaiacum, with my Preſs of Books, and Cheſt of Drawers with the Perſpective in it, to my dearly beloved Wife (the Defendant, Rebeccah Vachel) during the Term of her Natural Life. And my Will is, That if ſhe be with Child of a Son, that then after her Deceaſe, the ſame Paintings, Books of Print, *&c.* ſhall be left, remain, and come to the ſame Son. But if my Wife be not with Child of a Son, or if the ſame Son ſhall die without Iſſue Male of his Body, then my Will is, That all the ſaid Paintings, Books of Print, *&c.* after the Deceaſe of my ſaid Wife, and the Death of ſuch Son

as my Wife is now with Child of, ſhall come and remain to the Uſe of *Thomas Vachel* (the Father of the Plaintiff), of which my Will is that the ſaid *Thomas Vachel* ſhall have the Uſe only during his Life, and that he leave them to my Kinſman *Thomas Vachel*, his Son, (the Plaintiff) and that he ſhall, as far as in him lies, ſo diſpoſe thereof to him that ſhall by God's Bleſſing next ſucceed himſelf in my Manors and Lands in the County of *Berks*, that they remain as an Heir-loom, and go and remain to ſuch Perſon and Perſons as ſhall inherit my ſaid Manors and Lands, who I deſire may prove Lovers of Learning, Ingenuity and Arts. Which Clauſe the Defendants inſiſting to be revoked by a Codicil, and the Matter as to that Point having been fully heard, and his Lordſhip having had the Opinion of Civilians therein, did on the firſt of May laſt declare his Judgment to be, That the Uſe of the aforeſaid Rarities was well ſettled, by the Will of the ſaid Teſtator, upon the Plaintiff *Thomas Vachel*, after the Death of the ſaid Defendant *Rebeccah Vachel*, and not revoked. But the Defendants Counſel then inſiſting, That tho' they were admitted to be agreeable to the Civil Law, yet the very Limitation in the Clauſe of the Will of the Rarities to the Plaintiff was void by the Common Law. His Lordſhip for the Defendants farther Satisfaction, declared he would have the Opinion of the Lords the Judges therein, upon that ſingle Point of the Limitation of the Rarities, whether the ſame were a good or void Limitation. And the Cauſe now ſtanding in the Paper for a Determination in that Point, his Lordſhip declared he had adviſed with the Lords the Judges, and now aſſiſted with Mr. Juſtice Rainsford and Mr. Juſtice Wyld, upon deliberate Conſideration had of the Clauſe aforeſaid, in the Will, whereby the Uſe of the Rarities are deviſed to the Plaintiff after the Death of the ſaid Rebeccah Vachel; And foraſmuch as the ſaid Thomas Vachel the Plaintiff's Father died in the Life-time of the ſaid Tanfield, and the Defendant Rebeccah being not with Child of a Son, ſo as the Contingencies upon which the Limitation was made never happening, his Lordſhip with the Lords the Judges were all clear of Opinion, That the Deviſe to the ſaid Thomas Vachel the Son, was an abſolute Deviſe, and good in Law, and that the Defendant Rebeccah Vachel ought only to have the Uſe of the ſaid Rarities during her Life only, and the Plaintiff is to have the ſame after her Death, according to the ſaid Will; and doth order and decree the ſame accordingly, and that the Defen-

A Limitation of perſonal Chattels to one during Life, Remainder to another, good.

Defendant be examined upon Interrogatories for the Diſcovery of the Particulars of the Rarities and Matters ſo deviſed, and that an Inventory of the ſaid Rarities be made according to the ſaid Order of the firſt of May. And as touching Security now prayed by the Plaintiff's Counſel, and other Matters for final Compleating this Decree, the Court declared, That the ſame was not the proper Buſineſs of this Day, and they would not now determine the Matter, but leave the Plaintiff to move this Court therein, and then ſuch farther Order ſhall be made as ſhall be juſt.

The Lord Keeper.
Juſtice { Twiſden. Rainsford. Wyld.

Wood *againſt* Sanders, *or* Sanders *againſt* Wood.

July 1.

A Long Term of Years was aſſigned upon a Truſt to permit the Father to receive the Profits for ſixty Years, if he live ſo long; and after his Death to permit the Mother, his Wife, to receive the Profits for ſixty Years, if ſhe ſo long live; and after the Death of the Father and Mother, to permit John the Son his Executor, &c. in Caſe he ſurvive his Father and Mother, to receive the Rents, &c. And that the Truſtees, at the Requeſt of John, after the Death of his Father and Mother, ſhould aſſign to him, his Executors, &c. But if John die in the Life-time of his Father and Mother, and leave Iſſue, which ſhall be living at the Death of his Father and Mother, then the Truſtees to aſſign the Premiſſes to ſuch Son of John which ſhall be his eldeſt Son at that Time, &c. But if John die without Iſſue before any ſuch Aſſignment, that then the Truſtees ſhall permit Edward, another Son of the ſaid Father and Mother, and the Heirs of his Body; and in Default of ſuch Iſſue, Nicholas, a third Son of the ſame Father and Mother, and the Heirs of his Body; and for Default of ſuch Iſſue, the Executors, &c. of Nicholas to receive the Profits of the Premiſſes during the Term, to their own Uſes. John dies

The Truſt of a Term, limited in Remainder upon a Contingency, &c. *Vide ant.* 8. and 3 *Chan. Caſes* 35, 51, &c. 1 *Roll. Abr.* 612.

Intestate in the Life of his Father and Mother, and without Issue, and before any Assignment the Father and Mother die; Edward the Son enters and receives the Profits, and dies Intestate without Issue; Elizabeth his Wife takes Administration, enters and receives the Profits; Nicholas the third Son takes Administration to John his Brother, and procures the Trustees to assign to him.

The Question was, Who hath a Right to this Lease? whether Nicholas the Administrator of John (who died in his Father's Life) or the Administrator of Edward, who enjoyed during Life, or Nicholas the third Son in his own Right?

Where the Trust of a Term is to one for Life, the Remainder for Life, the Remainder to a third Person (if he outlive the Tenant for Life) the Remainder to another and his Heirs, that the Remainder to the third Person (he dying before Tenant for Life) does not vest it in his Executors. *Vide ant.* 58.

It was unanimously resolved, That where the Trust of a Term is to one for Life, the Remainder for Life, the Remainder to a third Person for the whole Term (if he outlive the Tenants for Life) the Remainder to another as Heir to Edward the Son, and the Heirs of his Body, that the Remainder to the third Person, viz. John, being meerly contingent, was not so vested in him, as that his Executors could have it, he dying before his Father and Mother; and that the Contingency not happening, he dying in the Life of Tenant for Life, the Remainder over to Edward was well limited after such a contingent Remainder. Vide as to this Point the Case of the Duke of Norfolk.

DE
Term. Sanct. Mich.
Anno Regis 21 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Smith *againſt* Palmer. October 25.

A Truſt decreed for one, who being impoſed on had deny'd it in a former Anſwer.

UPON a Difference between the Plaintiff and one John Browning, an Award was made that Browning ſhould pay the Plaintiff 5 l. in Hand, and 23 l. at ſeveral Days, and for that Purpoſe Browning to enter into a Bond of 50 l. Penalty. This Bond was taken in the Name of Brown. Browning exhibits his Bill againſt Smith and Brown, ſuggeſting a Fraud in obtaining the ſaid Bond, and that the ſame was in Truſt for Smith. Smith and Brown join in an Anſwer to that Bill, and there Smith ſwears, That he was indebted to Brown more than 23 l. and that Browning being awarded to pay him that 23 l. Brown did accept of that Bond for ſo much of what Smith owed Brown; and ſo ſaid it was not upon any Truſt for Smith, but taken to Brown's own Uſe, Brown being dead, and the Defendant his Executor. The Plaintiff Smith by his now Bill ſeeks to have the Bond out of Brown's Executors Hands, and chargeth his Name to have been uſed in Truſt for the Plaintiff.

The

The Defendant pleads the former Answer in the other Cause, and that thereby the now Plaintiff had deny'd any Trusts in Brown for him, and swore the Bond was taken in Brown's Name for his own Use, prout.

The Plaintiff replied, That Brown was his Solicitor in the other Cause, and that he answered by his Advice, and that he advised it was fit to answer to them, and for that Purpose advised the now Plaintiff, before he put in that Answer, to enter into a Bond to Brown for more Money, that so he might swear as he did in that Answer; which Bond he promised Smith to deliver back when he had put in his Answer; and did so, and averred he was at the whole Charge in Defending the Suit, and that Brown after that Answer owned the Trust in that Bond of 23 l. for the Plaintiff; and there was Proof of that.

And upon the Hearing of this Cause, it was taken to be a Fraud in Brown to draw the Plaintiff in to put in such an Answer upon Oath in the other Cause, that the Bond was in Trust for him: And the Defendant was decreed to deliver up the Bond to the Plaintiff, with a Letter of Attorney to put it in Suit.

For Relief in Equity against Frauds, &c. *vide ant.* 100. *post.* 216, 217, 244, 245, 276, 289. *Maxims of Equity* 3, 4, 6. 2 *Vern.* 8, 123, 133, 150, 151, 189, 206, 260, &c. 1 *Vern.* 167, 271, 467, 20, 32, 46, 51, 205, 219, 237, &c.

At the Rolls. The Master of the Rolls.

Richard West, *Clerk, and divers others the Churchwardens and Overseers of the Poor of* Great Creaton, *against* Knight *and his Wife, Executrix of* John Palmer. October 27.

JOHN Palmer had by Will given 50 l. to the Parish of Great Creaton, where he was born, (without saying to what Use.) The Minister, Churchwardens and Overseers for the Poor exhibited this Bill for the 50 l. suggesting, That he intended it for the Benefit of the Poor.

The Defendant the Executrix confesseth the Devise, and offered, if she were bound to pay it, to assign some Security for Money owing to the Testator to satisfy it.

10 May, 1669. This Cause was first heard by the Master of the Rolls. And it being then insisted by the Defendant's Counsel, That the Devise was void, and that the Parish being no Corporation, could not sue for it by Original

ginal Bill; and that it was a void Devise, for that there was no Use limited touching the 50l. whether it were for the Poor, or for Repair of the Church, or Highways, &c. And it was moved upon, That if the Plaintiffs had any Ground of Relief, it must be by Commission of Charitable Uses, and not by Bill. The Master of the Rolls ordered Precedents to be produced before he would deliver his Opinion.

And now at this Day, upon further hearing the Cause, a Decree of this Court, 30 June, 1657. was produced, St. John's College against Plat, where upon the Advice of four Judges it was resolved, That upon an Original Bill the Chancery might relieve within the Statute of Charitable Uses. And therefore, inasmuch as the 50l. was the Personal Legacy, and no Devise of Lands, decreed, That the 50l. be paid as far as the Defendants have Assets of their Testator, and directed it to an Account to see what Assets, and the Master to whom it was referred, to see the Money disposed for the Benefit of the Poor of the Parish.

Relief given by Bill on the Statute of charitable Uses. *Vide post.* 158, &c. *ibid.* 193, 198, 267.

Money given to a Parish generally without saying to what Use, decreed to the Poor of the Parish. *Post.*

The Lord Keeper.
Justice Windham.
Baron Turner.

Nelthrop *and* Margaret *his Wife, against* Hill, Biscoe, *and* Anne *his Wife.* October 6.

THIS Cause was heard first before the Lord Keeper. The Case. The Plaintiff Margaret and the Defendant Anne were the two Daughters of Smith, who having made his Will eighteen Years since, and Hill Executor and Curator of the Children (both then in Infancy) by his Will gave several Legacies, and then gave the Residue of his Personal Estate to be equally divided between his two Daughters, Anne and Margaret; and if both die before Marriage of full Age, then he deviseth it over to another. Biscoe marrieth Anne the eldest Sister, and then one Moiety of the Estate, which was good, and in the Hands of the Executor, is paid to Biscoe and his Wife, and

Executor to take Security on Payment of Legacies in Case of a Defect of Assets. 1 *Vern.* 31, 94, 162, 482. 2 *Vern.* 111, 205, 334.

Biscoe

Biſcoe ſettles a Jointure for this on his Wife, and gives the Executor a Diſcharge.

Afterwards the Executor puts out the other Moiety (Margaret being ſtill in Minority) on Security, and Part of it is loſt. Then Margaret marries Nelthrop, and they bring this Bill againſt the Executor, and Biſcoe and his Wife, to have a Contribution towards the Loſs born by them, and to have Biſcoe refund.

Upon the firſt Hearing it was ſo decreed, unleſs Biſcoe ſhewed Precedents to the contrary.

Now upon farther hearing this Day, (viz. 10 Jan. 1669.) before the Lord Keeper, Mr. Juſtice Wyld, and Mr. Baron Turner, it was for Biſcoe inſiſted, That by the Marriage of Anne, her Moiety became due, and the Deviſe over is defeated: So that if Biſcoe and his Wife had brought their Bill for it, the Executor could not have denied Payment of it, and ſo Biſcoe hath done no Default, who hath not his Money 'till due, and he is not concerned to look any farther; and in lieu of the Portion a Jointure is made, and a Releaſe for the Legacy is given; and probably, if the Executor would not have paid, Anne might have loſt her Preferment, and the Executor was by the Will the Curator of the Children. And it was ſaid, That by Anne's Marriage firſt, ſhe became firſt entitled. And it was inſiſted, That where Legacies are payable at ſeveral Times, and the Legacy that is firſt due is paid when due, and there is Money in the Executor's Hands to pay the other Legacies, that if a Loſs fall on that afterwards, there is Equity in that Caſe to put the firſt paid Legatee to refund.

For the Plaintiff it was inſiſted, That there was in this Caſe no Time limited for Payment of either; and that by the Marriage of Anne, the Deviſe over being defeated, both became due and payable, the Deviſe being indefinite, without any expreſs Time of Payment; and the Plaintiff Margaret's Infancy ought not to turn to her Prejudice; and that it was the Teſtator's Intention that they ſhould have it equally, one as much as the other. And if Biſcoe had ſued, the Executor might have required Security to refund.

Where a Legatee ſhall refund for want of Aſſets, *vide poſt.* 148, 149, 248, 256, 257. *Max. Eq.* 12, 13, *&c. ibid.*

And it was ſaid and admitted by the Court, That if Executors pay out the Aſſets in Legacies, and afterwards Debts appear, and they be forced to pay them, of which they had no Notice before the Legacies paid, That

the Executors by a Bill here might force the Legatees to refund.

But as to that it was answered, That Case was not like to this; for there was not enough to pay all when the Legacies were paid, but here was enough when the Legacies were paid to pay all, and the Loss since.

And for the Plaintiff it was farther insisted, That a Division could not be made without the Plaintiff Margaret called to it; and the Case of Grove and Banson insisted on, where Banson had a Conveyance and Statute for his Wife's Legacy, and yet put to refund.

But as to that Case it was answered, There was not any Payment, but a Security, and by that he would have had a Redemption; so this Payment was not paid, but executory. And the Plaintiff cited the Case of Picks and Vincner upon Sir Henry Martin's Certificate, which was 29 Octob. 1639. and was in Substance thus: That an Executor may not pay one, if he hath not enough to pay all; and an Executor is not bound to pay a Legacy without Security to refund if there be want of Assets to pay either Debts or Legacies. Which was not, as is said, to this Purpose, there being at the Time when this Legacy was paid, enough to pay all.

Ordered the Cause be set down to be re-heard originally, as well against the Executor, as the Legatee Biscoe and his Wife.

Quære, If there be not a Difference between Debts and Legacies thus: Debts may appear to the Executors, but Legacies appear in the Will? And quære, If therefore Executors be not bound more strictly to take Security against Legacies that do appear, than Debts that do not?

Of Legatees decreed to refund. *Vide Vern.* 94, 162. 2 *Ventr.* 360. 1 *Chanc. Rep.* 133. 2 *Chanc. Cases* 9, 54, 136, 248. 1 *Vern.* 455. *post.* 248.

Picks ag. *Vincner*, 29 *Octob.* 2639.

Executor not bound to pay a Legacy without Security to refund. Max. Eq. 12, 13. 1 Vent. 472. post. 136, &c. ant. 32.

See for this *Max. Eq. pag.* 12 and 13, the Cases there cited.

And note the Case 1 *Vern.* 482. *viz.* Lands being devised for Payment of Debts and Legacies, 'twas at first decreed, That both should be paid in equal Degree. But that Decree was revers'd by Lord Keeper *North*; and *Jeffries* declared, he was dissatisfied with that Reversal——But after all, I take it there is a great Difference between Debts and Legacies, the former being *ex debito Justitiæ*, and the latter only *ex opere Charitatis*; and we must allow *Justice* to be preferable to *Charity*.

The Maſter of the Rolls. Firſt Hearing.

Charles Fry *Gent. and the Lady* Anne *his Wife, and* Mountjoy Fry *an Infant, by their Guardian, againſt* George Porter, *an Infant, by* George Porter *his Uncle and Guardian.* Octob. 13.

A Legacy given on Condition the Legatee marries with Conſent, where recoverable in Equity, or not, *ant.* 22. 1 *Mod.* 308. 2 *Ventr.* 352. 1 *Vern.* 20, 222. 2 *Vern.* 333, 371.

MOuntjoy Earl of Newport had two Daughters, Iſabella, who by his Conſent married Nicholas Earl of Banbury, (whoſe Daughter the Plaintiff the Lady Anne is) and Anne, who without her Father's Conſent married Thomas Porter Eſq; by whom ſhe had George the Defendant the Infant.

The Earl of Newport being ſeized of Newport-Houſe in Fee, by his Will in writing, deviſeth in theſe Words:

Item, I give and bequeath unto the Lady *Anne* Counteſs of *Newport*, my dear Wife, all that my Houſe called *Newport-Houſe*, and all other my Tenements in the County of *Middleſex*, for her Life; and from and after the Death of my ſaid Wife, I do give my ſaid Houſe, and all other my Tenements in *Middleſex*, unto my Grandchild the Lady *Anne Knowles*, the Daughter of *Nicholas* Earl of *Banbury* by the Lady *Iſabella*, my late Daughter, and the Heirs of her Body to be begotten. Provided always, and upon Condition, That my ſaid Grandchild the Lady *Anne Knowls* do marry with the Conſent of my ſaid Wife, and of *Charles* Earl of *Warwick*, and of *Edward* Earl of *Mancheſter*, or the major Part of them. And in Caſe the Lady *Anne Knowls* do and ſhall marry without the Conſent of my ſaid Wife, or the major Part of my Truſtees aforeſaid, or ſhall happen to depart this Life without any Iſſue of her Body, then I will and bequeath all my ſaid Premiſſes unto my Grandchild *George Porter*, Son of my deceaſed Daughter the Lady *Anne*, late Wife of *Thomas Porter*, Eſq; and to his Heirs for ever.

The Plaintiff Fry, after the Death of the Lord Newport, ſtole away the Plaintiff, the Lady Anne, in the Night, from Newport-Houſe, (where ſhe lived with her Grandmother) over the Garden Wall; and ſo ſoon as ſhe was miſſed

miſſed by her Grandmother, and ſhe was informed of this Fact, ſhe ſent to the Earls of Warwick and Manchester, to inform them of it, who both proteſted againſt the Marriage as unfitting for the young Lady, who was at that Time about fourteen Years of Age, and declared their utter Diſlike of it. Afterwards theſe two Earls being examined for the Plaintiffs as Witneſſes in the Cauſe, ſay, That they do aſſent to the Marriage; and that they do not know but that if their Conſents had been asked for before the Marriage, ſuch Reaſon might have been given as they might have conſented to it. And they and other Witneſſes ſpeak as to the Earl of Newport's Intent, and frequent Declarations, that the Plaintiff the Lady Anne ſhould have Newport-Houſe, which the Plaintiff's Counſel would lay Weight upon to interpret the Meaning of the Will to be in terrorem only, and not to defeat the Deviſe to the Lady Anne.

The Bill was to be relieved againſt the Condition and the Breach of it.

And for the Plaintiffs on the firſt Hearing, which was before the Maſter of the Rolls only (in the Lord Keeper's Abſence) it was inſiſted on by Serjeant Fountain, That there were three Things in Equity, upon which the Plaintiff ought to be relieved againſt this Penalty.

1ſt. That there was no other Reaſon for this Condition and Penalty, but to prevent the Lady's Marriage without Conſent, and therefore it was to be expounded *in terrorem* only.

2dly. That this young Lady was but fourteen Years old, and knew nothing before her Marriage of the Condition.

3dly. As ſhe was in her Infancy, and knew nothing before her Marriage of the Condition, ſo ſoon after as ſhe did know it, ſhe did go to the two Earls (her Grandmother being dead) and they did approve of the Marriage.

For the Defendant it was inſiſted, That the Infancy or Want of Notice to her of the Condition, was of no Weight, for that there was not by the Will any Proviſion made, or any Directions given to give her Notice, but as ſhe takes by the Will as a Purchaſer, ſo ſhe muſt take it ſubject to ſuch Condition as the Will hath ſubjected it to, and is to take Notice at her Peril; and an Infant may break a Condition; and this Act of hers in marrying was but what the Earl had Reaſon to expect ſhe would do before

she came to the Age of One and twenty Years, it not being usual for Ladies of her Quality to stay till One and twenty before they marry. And as to the Pretence that this Condition was in terrorem, it was said, That it was a Limitation, and that it was by the Will limited over to the Defendant in case of the Lady Anne's Marriage without Consent, pari passu to her dying without Issue. And though the Civil Law may construe the Limitation in a Personalty over in such Cases as this to be void, and to be but in terrorem; yet in this Court, in the Case of Inheritances, as this is, nay even in the Case of Personalty, where it was limited over, as here, this Court hath not any Time avoided such Limitation over; the constant Difference taken in this Court being betwixt a Condition to make the Devise void without limiting over to another, and the Limiting over to another; in the first of which Cases the Court hath usually construed the Condition to be in terrorem only, because there is no other Person appointed to take, as in the Case of Sir Henry Bellasis now cited, (which you may see before, fol. 22.) But where it hath been limited over, it hath been always taken otherwise; as in the Case of Davis against Halton, Novemb. 1664. the Matter here being 1000 l. Part of what was given to the Party who broke the Condition. And so, tho' it were for a Personalty, the Limitation over is good.

Where the Legacy, on Condition the Legatee marry with Consent, is recoverable in Equity, notwithstanding the Breach of the Condition, and where not.
Vide Ant. 20, 22, 51, 52.
1 *Mod.* 308.
2 *Vent.* 352.
1 *Vern.* 20, 222.
2 *Vern.* 333, 721.

The Master of the Rolls. There is no Difference in this Case, whether it be a Condition or a Limitation, for the Penalty is the same in both. And this must be understood to be in terrorem; and the Infant had no Notice of the Condition; and so decreed against the Defendant. And that the Plaintiff, the Lady, and the Heirs of her Body, should hold and enjoy against him.

Appeal.
Lord Keeper.
Ch. Just. *Keeling*,
Ch. Just. *Vaughan*,
Ch. Baron *Hale*.

The Defendant appealed from this Order by a Petition, and prayed the Entry of it might be stayed; and it was so, and order'd to be re-heard by the Lord Keeper, assisted with the Lord Chief Justice Keeling, Chief Justice Vaughan, and Chief Baron Hales, 22 April 1670. At which hearing it was insisted by Serjeant Fountain for the Plaintiff, That this was a Penalty in terrorem, that the Daughter might not rashly marry; but she was then an Infant, without Notice of it, and the Earls do approve the Marriage.

Serjeant Maynard for the Defendant. It is a Limitation, not a Condition. A Will would not pass Lands by the Common Law, it is by the Statute; and that says the Will shall stand. And for Notice, the Law requires no Notice to be given, nor did the Earl the Devisor require any. And who should give Notice? The Defendant is an Infant, and could we give Notice? Mente Testatum ratum est.

Mr. Solicitor Finch for the Defendant. There can be no Decree, for the subsequent Approbation works nothing, and was extorted by Compulsion. For when the Earls were first acquainted with the Marriage, they disallowed it, and the Estate devested out of the Lady by the Marriage without Consent, and the subsequent Assent cannot revest it. The primary Intention was in terrorem, to restrain the Lady from an imprudent Disposal of her self; but the secondary Intention was, that if she did marry without Consent, she should lose the Lands. The Grandfather could not have settled it stronger than he hath: And that the Grandfather may impose such Condition on his Children, is not to be deny'd. And if this Court should relieve against it, it is to encourage Disobedience in Children to Parents. And this is a Case purely at Law, and the Matter of Notice and other Circumstances are all to be considered at Law as well as here; and if not relievable there, it is the same here. And if Notice is necessary, as I conceive it is not, that is purely at Law; and possibly it may be found at one Trial that there was not Notice, and at another it may be found there was Notice; and it being Matter of Inheritance and Freehold, the Defendant ought to be at Liberty to try it toties quoties.

Subsequent Assent will not supply the Want of Consent precedent.

Serjeant Fountain. A Limitation may be at Law, and yet relievable here: As, if the Condition be to have the Consent in Writing, and the Consent is had without Writing, this Court will help in that Case. And he doubted whether a Father can so provide or limit an Estate, as that a Court of Equity shall have no Power over it; for it cannot be so provided by Agreement of Parties in Case of a Mortgage, that this Court shall not give Relief; and Equity is Part of the Law of England. And there are Emergencies and Cases which a Man cannot provide for: As, Suppose the Plaintiffs had sent to the Parties for their Consent, and the Messenger never went, but said he did, and had their Consent, and upon this she had married, she should

A Condition may not be performed in all Circumstances, and yet be relieved here.
Ant. 22, 53, 58, 90.
Post. 191.
Agreement of Parties cannot prevent a Court of Equity in its Jurisdiction.

Equity regards the Substance, and not the Ceremony. See for this *Maxims of Equity*, p. 53 to 60. and the Cases there cited.

should certainly be help'd in Equity. And the End of the Will is performed; she was to marry such Person as the Earls should like of, and they have approved, and so the Substance is performed; and whether it be a Limitation or Condition is equally penal; and a Limitation over of personal Legacies, is void by the Civil Law, I grant; but that in some Cases of a Limitation over there may be Equity, it clearly follows in this, upon the Circumstances of Infancy, and not Notice and Assent subsequent.

The Court would see Precedents: And then 30 May, 1670. upon Perusal of all the Precedents, the whole Court agreed in one uniform Opinion to dismiss the Bill, and accordingly it was dismissed.

Chief Baron Hale argued thus:

1st. It is to be considered whether this be a good Condition or Limitation?

2dly. Whether any Relief be to be given against it?

3dly. Whether upon the Circumstances it is relievable here?

1st. He conceived it a Limitation and Condition both in Law and Equity, because it is collateral to the Land; she may marry if she will; but if without Consent there is a Penalty.

2dly. It is a Condition, because it is to contain the Party in that due Obedience which Law and Nature oblige her; and she should have applied to her Grandmother for her Consent, though there had been no such Condition. And altho' in the Civil Law, in the Case of a meer Personalty, the Limitation over to void; yet this is a Devise of the Lands not governed by that Law. Estates governable by the Law of this Kingdom, without Relation to another Form, ought not to be influenced by another Law; and this being a good Condition, it cannot be in Law defeated; and there being a full Breach of the Condition, as Law will not, Equity cannot help. And as to the Objection, If there may not be Relief against Breach of Conditions in Equity, there will be a great Shatter in Decrees already made: This Case is not like the Case of a Mortgage, where the Condition is for Payment of Money, because there if the Money be not paid at the Day, there may be a Compensation made by Payment at another Day with Damages.

Estates governable by the Common Law, ought not to be influenced by another Law. *Ant.* 79, 80.

3dly. Again, This Breach is not relievable in Equity, because it is a voluntary Disposition throughout, both in equali gradu, as to the Settlement, and as to the Blood of him that made the Settlement. And it appears by the Will of the Earl of Newport that made the Settlement, That he did as really intend it should go over for marrying without Consent, as the Lady's dying without Issue. And he rests much on it, that there is no Precedent of any Relief given in this Case; for upon View of all the Precedents, he doth not think any of them come to this Case; and it is not fit to go further than the Court hath gone already; for if they should, there would be no End, and it is fit to set Bounds. And as to what was offered from the Proof, that it was the Earl's Intention that the Lady should have Newport-House, and that therefore it was in terrorem; he said, That no collateral Averment to expound the Will ought to be admitted; for if there should, there would be no Certainty in any Case. And as to the Earl's approving the Marriage since, he said they were charitable therein; and tho' Equity will favour Infants, yet an Infant may be bound by Law to a Performance of a Condition; and inasmuch as this Condition is annexed to an Act (Marriage) which she as an Infant might do, the Infancy will not help. And as to the Point of Notice, I will not determine here whether Notice be requisite and necessary; for that is at Law, and want of it, if necessary, will avail there. I will not say what Equity may do in Case of want of Notice; but that Fact is not settled whether Notice or not. It would be hard, because there is not full Notice proved, to conclude here is no Notice; and so would have the Bill dismiss'd.

The Breach of a Condition annex'd to a voluntary Disposition, not relievable in Equity.

Tamen quære; for the two Cases of *Peyton* and *Shipdam*, and *Cook* and *Tookey* here cited for Precedents, are otherwise.

No collateral Averment to be received to expound a Devise of Land.

Whether Notice be necessary to be given of a Condition annex'd to an Estate, to the Person to whom the Estate is given.

Keeling agreed, and said, 'Tis fit to keep those Bonds which Parents impose to hold their Children at Obedience, streight, and not fit for a Court of Equity to relax them.

Vaughan. As to the Consent subsequent, that signifies nothing; for a Man cannot be said to consent to a Thing which is not capable of Consent; as, to say a Man consents that his Heir is of such a Colour, is Nonsense, for that is not an Object of his Consent; and after the Marriage their Consents signifie no more in that Case.

The Lord Keeper declared, he was clear of Opinion that Equity ought not to interpose in this Case, and was

See the Duke of *Norfolk's* Caſe.

was glad to ſee that a Parent could ſettle his Eſtate, that it might be out of the Power of a Court of Equity; and ſo the Bill was diſmiſſed.

Note, That upon Trial, and an Argument after this Hearing in the King's Bench, it was adjudged that Notice was not neceſſary to be given.

The Precedents cited in this Caſe were, Sir Henry Bellaſis, fol. 22. Flemming and Walgrave, fol. 58. Wallis and Crimes, fol. 89. Eſcot and Eſcot, 7 Febr. 1653. Coke and Tookey, 24 May, 15 Car. 1. Peyton and Shipdam, Novemb. 1657. The two laſt Caſes were, Whether Relief were given for the Breach of a Condition on Nonpayment at the Day, on a voluntary Deviſe, there being no Damage but what might be made up by Payment after with Damages.

And note; this is now a general Rule of Equity, that no Advantage ſhall be taken of a Penalty or Forfeiture where a Compenſation may be made. *Vide Max. Eq.* 44, 45, *&c.* See alſo *ibid.* 25.

The Lord Keeper.

Davy *againſt* Davy. December 11.

Rent-charge, and no Diſtreſs found. *Q.* if it charge the Perſon of the Heir.

THE Plaintiff was eldeſt Son by a ſecond Venter, and the Defendant was eldeſt Son and Heir by the firſt Venter; and the Bill was, to be relieved for a Rent-charge of 200 l. per Ann. of which there was half a Year due.

The Bill did ſuggeſt, That the Defendant kept not any Stock upon the Ground, but converted it all to Tillage, ſo that the Plaintiff had not a ſufficient Diſtreſs, and ſo was without Remedy ſave in Equity, and prayed a Decree againſt the Defendant for the Arreas and growing Payments.

The Defendant demurred for that the Lands only being charged with the Rent at Law, there was no Equity to charge the Defendant's Perſon.

Defective Aſſurance, *ant.* 39, 70, *&c. ibid.*

But this Demurrer was over-ruled, it being laid in the Bill, That there was a legal Defect in the Aſſurance, which ought to be made good in Equity, the Grant being on a good Conſideration.

The Defendant anſwered, and denied the Converting the Premiſſes always to Tillage, or that the ſame were not overt to a Diſtreſs; but ſaid there had been divers Times a Stock worth 250 l. upon them.

After Proofs published in the Cause, it was heard before the Lord Keeper, 20 Nov. 1667. And the only Equity there insisted on for the Complainant was, That the Defendant imployed all the Lands to Tillage, so that the Plaintiff could not distrain, there being no Cattle kept on the Premisses. But the Defendant did insist, That he did keep a Stock of Cattle thereon sometimes worth 250 l. at a Time, and that the Plaintiff endeavoured to charge the Defendant's Person with the Rent, which was not liable at the Law. But the Plaintiff's Counsel replied, That tho' possibly he might have Remedy at Law, yet it was usual to settle Matters of this Nature in Chancery.

A Rent which chargeth only the Land, not to be decreed in Equity against the Person. *Vide ant.* 79, 80, 120. See 2 *Vern.* 374, 382, 386, 516, 517, 612. *New Cas. in Eq.* 21. 3 *Chan. Rep.* 11.

Whereupon, and upon Reading the Proofs in the Cause, the Court declared they would be attended with Precedents where Cases of this Nature had been relieved, and then would give their Opinion. 8 Nov. 1668. the Court ordered the Cause to be set down again on the Precedents, which the Plaintiff was to deliver to the Defendant. One Precedent was this: Seymor Boreman and Francis Yeat Plaintiffs, against John Yeat, Esq; Defendant. The Bill was grounded upon an Agreement made upon the Marriage of John Yeat, the Father of the Plaintiff Francis, with Frances his Mother, and a tripartite Deed 15 Car. 1. in Pursuance thereof, whereby John the Father became seized in Tail, and after the Death of Thomas his Father, covenants to levy a Fine, to the Intent Elizabeth (Mother of Frances, his second Wife, after the Death of Thomas and himself) and her Assigns should have, during her Life, out of the Premisses 150 l. per Annum, if John should have Heirs Males of his Body that should so long live; and to the Heirs Males of the Body of John by the said Elizabeth, another 150 l. per Annum, during the Life of the said Elizabeth; and that the Heirs Males of the Body of John and Elizabeth have 300 l. per Annum out of the Premisses, with a Clause of Distress, and a Covenant to make further Assurance. A Fine was levied accordingly, August, 1663. John the Father died in the Life of Thomas his Father. Elizabeth sold her Right to the 150 l. limited to her self after the Death of Thomas, to the Plaintiff Boreman, and in October before the Bill Thomas died, whereby the Plaintiffs became intitled to the several Rents, the Lands descending to the Defendant as Heir to his Grandfather, being eldest Son of John by a former Venter, and he had all the Deeds,

Bowman or *Boreman* against *Yeat*.

20 *Jan.* 1660.

Confusion of Bounds of Lands out of which a Rent-charge issues, proper Matter for Relief in Equity.

and refused to pay the Rents, pretending the Lands were not sufficient, and the Limitation in Law defective; and the Lands lying intermix'd with others, and Boundaries confused, the Plaintiffs could not distrain, and so prayed Relief here. And charged also, that the Defendant's Father agreed, that if the Lands were too small in Value, or defective in Title, he would make both good. To have that done, and to discover the Buttals and Boundaries, and to have the Rents arrear and growing Rents paid, was the Scope of the Bill.

The Defendant by Answer insisted, That the Plaintiff's proper Remedy was at Law, and that Boreman had not a good Title, because he had not any Attornment, for ought appeared, or any good Conveyance from Elizabeth, and justified the Detainer of the Deeds.

On the first Hearing, 25 Jan. 12 Car. 2. Ordered a Commission to go to set out the Lands, and Boreman's Title to be determined on the Return of the Commission. The Commissioners certified that they had set out the Lands, the present Rents whereof were but 70 l. per Annum, and that the Lands charged were 300 l. per Annum; and then the Cause came again to be heard before the Lord Chancellor and the two Chief Justices, 12 Jan. 1660. And as to Boreman's Title as Assignee to Elizabeth, by which he claimed the Arrears from Thomas Yeat's Death, during Elizabeth's Life, the Matter stood upon was, That he did not prove he had paid any Purchase money.

A Limitation to Heirs Males taken in Equity as a Limitation to the first Son. *Vide ant.* 8, 9.

The Court conceived that was not material, he claiming under Elizabeth, who was intitled by the Marriage-agreement, and so capable of Relief.

A defective Limitation in Point of Law supplied in Equity. *Vide post.* 159, 160, 161, *&c. ibid.*

And the next Point was as to the other Plaintiffs to 100 l. per Annum during Elizabeth's Life, and 300 l. after to him and the Heirs Males of his Body. Whereupon the Court declared, That though the Limitation of these Rents were defective in Law, so as the Plaintiff could have no Remedy at Law, yet by the true Meaning of the Marriage-agreement, the Plaintiff Francis is well described to take the Rent, and both the Plaintiffs well intitled, and ought to have Relief so far forth as the Lands and Rents reserved on the Leases, and the Lands, as they shall come out of the Lease, shall be of Value to make good the same; and that Boreman ought to be first paid; and decreed the same accordingly, and the Defendant to account for the Mesne Profits, &c. And for the future

the Rents reserved and the Lands out of which the Rents and Profits are issuing, at the highest yearly Value, not exceeding 200 l. per Annum, after the Leases expire, should be liable to the Payment of those Rents to the Plaintiff Boreman, during Elizabeth's Life; and after 300 l. per Annum to the Plaintiff Francis, according to the true Meaning of the Deed.

The Difference between the two Cases was,

First, In the principal Case the Rent was well limited to the Plaintiff in Point of Law, by the Name of the first Son of the second Venter, and he may distrain, and having Seisin, may bring an Assize. But in Boreman's Case, neither himself had any Remedy at Law for Want of Attornment, and by reason of Intermixture with other Lands, nor had the other Plaintiff, by reason he was not Heir Male to his Father; but that Defendant was by a former Venter, so the Limitation was not good in Law. And observe in Boreman's Case the Lands only are made liable, not the Person.

Another Precedent deliver'd by the Plaintiff to the Defendant, was 22 June, 1644. Elizabeth Ferris against Newby, where an Annuity being devised by Will, and by the same Will the same Lands devised to an half-Brother of the Devisee of the Annuity, this being a Rent-Seck without Seisin, and no Power of Distress, and the Devisee of the Lands having promised to pay it; the Court did decree the Devisee of the Lands to give Seisin of the Rent to the Devisee of the Annuity; which Case, as was conceived, was against the Plaintiff in the principal Case, it being in his Power to have Seisin when he would. And the Court in this Case did not decree the Lands to be liable.

Moor 805. *Pl.* 1092. *Latch.* 146. 1 *Roll. Abr.* 378. *Pl.* 22, 374. *Pl.* 4. 4 *Leon.* 184. *Ant.* 79, 144. *Post.* 185.

Seisin decreed of a Rent-Seck. See *Max. of Equity* 25, 26. *Ant.* 32, 79, 145. *Post.* 185, 269, 273.

And now, upon further hearing of the principal Case, the Plaintiff's Counsel did not think fit to insist upon, or so much as to mention their Precedents, but stood only upon the Defect of a Distress, and that the Arrears of the 200 l. per Ann. were now 100 l. and the Land but 200 l. per Annum.

The Lord Keeper declared on the Debate of the principal Case, That unless there did appear a Fraud to hinder the Plaintiff of his Distress, he could not have Relief here: And that all he could do was to refer it to a Trial at Law, Whether there was any Fraud to hinder the Plaintiff of his Distress? And accordingly at the Plaintiff's Desire did refer it to a Trial.

Fraud to hinder a Distress, where tried. *Vide ant.* 100, 216, 217, 244. *Post.* 289.

The Lord Keeper.

Trevor *againſt* Perryor. December 4.

On a Demurrer.

THE Plaintiff was an Executor to an Obligee, and the Bill was to have an Equity of Redemption, which deſcended to the Heir of the Obligor by his Death, made Aſſets in Equity.

To this Bill it was demurred in Bennet and Box's Caſe; and on Debate the Lord Keeper inclined to think it all one with that Caſe.

Whether an Equity of Redemption in the Heir of the Mortgagor be Aſſets in Equity. *Ant.* 14, 57, 128. *Poſt.* 226, 257.

But for the Plaintiff it was inſiſted, That that Caſe was an hard Caſe to be eſtabliſhed in a Court of Equity; and that this is a ſtronger Caſe, for here the Lands were once in the Obligor, and never abſolutely put out of him, but conditionally by way of Pledge for Money: And the Equity of Redemption he had was as conſiderable as the Redemption, which was Aſſets at Law. So the Lord Keeper ordered to anſwer; but ſaved the Benefit of the Demurrer to the Hearing of the Cauſe.

The Lord Keeper.
Juſtice Wyld.

Huttoft Grove *againſt* Banſon *and his Wife, and* Thomas Grove. December 14.

Legatees to abate in Proportion where there want Aſſets. *Vide ant.* 136.

HUttoft, the Plaintiff's Grandfather, poſſeſſed of a great Perſonal Eſtate, gave the Plaintiff 5000 l. and 500 l. to his Siſter, Banſon's Wife, and made the Defendant Thomas Grove his Executor, who had purchaſed the Manor of Beeren-Hall with Part of the Teſtator's Money, and mortgaged it to Perryor, and forfeited it. Upon the Marriage of his Daughter to Banſon, he agrees her Portion to be for Legacy, Intereſt, and what more he would

give her, 1000 l. and enters into a Statute to Banſon for the ſame, and then he grants the Equity of Redemption and the Reverſion (for the Mortgage was but for a long Term of Years) to Banſon as a farther Security. The Bill was to be admitted to redeem the Mortgage, and to have the Legatees loſe in Proportion. And tho' Banſon had a Statute and Mortgage prout, whereby it was ſaid his 1000 l. continued no longer a Legacy, but was as much a Debt to him, as if he had lent the Money; and he took it as ſo much Portion, or elſe he would not have married: Yet the Lord Keeper declared, That inaſmuch as the Legacy was not paid, but only ſecured, he conceived it equitable for each Legatee to loſe in Proportion, there not being enough of Thomas Grove's Eſtate to pay all, and would not admit Banſon to redeem, but the Plaintiff, for that his was the greater Debt; and ſo ordered that he ſhould redeem, and Banſon ſhould loſe of his Wife's Portion in Proportion with the Plaintiff. And in this Caſe the Caſe of Pink and Vincner, 1639. by Advice of Civilians, was cited, where it was reſolved, That an Executor was not bound to pay a Legacy, but on Security to refund, in caſe there ſhould be a Defect of Aſſets to pay Debts and Legacies. But that, as was ſaid, was not applicable to the principal Caſe; for the Teſtator had left ample Aſſets, but Thomas Grove had waſted them, and was inſolvent.

Vide ant. 60, 136. *Poſt.* 248, 226, 256, 257, &c.

An Executor not bound to pay a Legacy without Security to refund in caſe of Defect of Aſſets.
Vide the Caſe of *Pick* and *Vincner* more largely in *Grove* and *Benſon.*

The Lord Keeper.

Higgon *and others againſt* Syddal, Calamy, *and others.* December 15.

On a PLEA.

THE Caſe was this: Syddal granted a Rent-Charge of 300 l. per Annum for 2000 l. to the Plaintiff, and after mortgaged the Premiſſes for 1200 l. to Calamy. Then thoſe that have Calamy's Intereſt, he being dead, buy in a Judgment precedent to the Grant of the Rent-Charge. The Plaintiff exhibits his Bill to diſcover what Eſtate the Defendant claims, and chargeth that Calamy had Notice of the Plaintiff's Rent before his Mortgage.

2 *Vent.* 337, 338. *Hard.* 173. 2 *Chanc. Caſes* 208. 1 *Chanc. Caſes* 202, 162, 163, 36, 201. 2 *Chanc. Caſes* 20, 35, 213.

The

A Mortgagee without Notice of a precedent Incumbrance, buys an Incumbrance precedent to that; he ſhall not be impeach'd in Equity, but on Payment of all which is due to him on both Eſtates.
Vide prox. ant. 102, 109, 119. *poſt.* 162, 166, 167.

The Defendants plead the Mortgage to Calamy, and that afterwards hearing of precedent Incumbrances, they bought in a legal Title precedent to the Plaintiff's, and offer, that if the Plaintiff will pay all due on the Mortgage, and on their new acquired Title, to aſſign all to him. But if he will not, they ſtand upon it they ought not to diſcover what that Eſtate is they have bought in, nor ought their Title to be drawn under Examination in Equity; and by way of Anſwer denied that to their Knowledge or Belief Mr. Calamy had any Notice of the Rent-Charge when he lent the 1200 l. And on Debate the Plea was allowed as good.

The Lord Keeper.
Juſtice Wyld.

William Style *by* Original Bill, *againſt* William Martin *and* Elizabeth *his Wife, Relict and Adminiſtratrix of* Richard Boſvile, *Eſq*; *and* Robert Boſvile, *Son and Heir of the ſaid* Richard, *by Guardian.* December 16.

Original Bill to ſet aſide a Decree (on a Bill of Revivor) as obtained by Fraud, &c. and the now Plaintiff no Party.

THE Bill was an Original Bill to ſet aſide a Decree in 1664. obtained by the Defendant on a Bill of Revivor (to which the now Plaintiff is no Party) againſt John Style, Heir of Sir Humphrey Style, and others, as obtained by Fraud. The Caſe was thus:

Of Bills of Revivor.
Vide ant. 37.
Poſt. 152, 174, 122, &c.

Sir Humphrey Style's Lady (Mother of the ſaid Richard Boſvile) had by his Requeſt mortgaged a Manor of hers for 3000 l. borrowed by Sir Humphrey 8 Novemb. 8 Car. 1. And Sir Humphrey had agreed with his Lady, That if he did not pay off that 3000 l. that then his Lands in Kent ſhould ſtand obliged to pay 1500 l. of the 3000 l. for the Eaſe and Benefit of the ſaid Lady and her Heirs. And 15 Novemb. 8 Car. 1. he conveyed his Kentiſh Lands to Truſtees, which the Defendants ſay was for that Purpoſe, but no ſuch expreſs Truſt. Trin. 1641. the Lady Boſvile being dead, Richard Boſvile her Son and Heir exhibited his Bill againſt Sir Humphrey and the Truſtees of the Kentiſh Lands, to have the Benefit of this Agreement. And in

Trin. 1642. two Witneſſes were examined to the Proof of the Agreement againſt Sir Humphrey Style, and that the Conveyance of the Kentiſh Lands was on that Truſt. The Wars coming on, there was a Reſt, and no farther Proceedings till 1663. In 1665. Richard Boſvile, who was a Recuſant, died, his Heir then and yet an Infant. Michaelmas 1663. Martin & Uxor, and the other Defendant, the Infant, brought a Bill of Revivor againſt John Style, the Heir of Sir Humphrey, and the Heir of the ſurviving Truſtee. And in 1664. after the Anſwer of John Style, who by Anſwer ſaid he was willing the Plaintiffs in the Bill of Revivor may have their Money, if he may have the Reſt of the Lands, and Replication and farther Proof taken and publiſhed, it was decreed, That the Plaintiffs in the Bill of Revivor ſhould hold the Lands againſt John Style and his Heirs, and all claiming under Sir Humprey Style ſince the firſt Bill, until the 1500l. with Coſts and Intereſt were paid off, of which Bill of Revivor the now Plaintiff had due Notice given him, and he might, if he had pleaſed, come in by a Croſs-Bill, &c. before the Decree. The now Plaintiff made Title by an Intail of Sir Humphrey Style on him in 1638. precedent to the Original Bill, ſo that Title was not bound by the Decree. But that Settlement being in Truth revoked in 1643. he made another Title by the Will of Sir Humphrey Style in 1658. And for the now Plaintiff it was inſiſted, That there was a Colluſion in getting the Decree, the Defendant John Style admitting it by Anſwer to it on the Matter, and the now Plaintiff, who was Ter-tenant, no Party to it. And the Report of the Maſter who had computed the 1500l. and Intereſt to amount to 3600l. was confirmed without any Defence by John Style. And the Rule for Binding Titles pendente lite, (which is the Rule of the Practice at this Day) was the Lord Bacon's Rule, and that Rule is, That lis pendens binds, if it be in full Proſecution; but here was above twenty Years Ceſſation, and the Plaintiff had in that Time bought in Incumbrances, and improved the Lands, and the Notice given the Plaintiff of the Bill of Revivor was too late, Iſſue being joined, ſo that he could not come in. And it's ſaid, Where Judgment is obtained againſt the Land, and the Ter-tenant is no Party, a Writ of Deceit lies for the Ter-tenant; and ſo in a Parity of Reaſon this Bill was maintainable for the now Complainant. Spencer's Caſe, 5th Report, was cited. And it

Note; Though Notice to a Stranger of a Bill of Revivor is neceſſary; yet tis improper to make him a Party not being in Privity, &c.

it was further said for the Plaintiff, That there was no such Agreement between Sir Humphrey Style and his Lady, as the Decree was grounded upon.

For the Defendant it was said, That the Plaintiff was stopt to say there was such an Agreement by Decree.

A Stranger being bound by a Decree gotten by Fraud, may falsify it.

Lord Keeper. A Stranger may falsify at the Common Law; and if the Decree be by Fraud, the Plaintiff may then be admitted to falsify the Agreement. But it is not Form, but the Substance of a Decree, that all be bound that come in pendente lite.

All that come in *pendente lite* are bound by a Decree.

But the Defendant's Counsel insisted, That there was no Fraud; for the main Witnesses which were to the Agreement were examined in Sir Humphrey Style's Life-time. Those which were examined after, were to prove the Payment of the 3000 l. the Mortgage-money, which was paid afterwards; and Notice was given to the now Plaintiff before any Examination of the Bill of Revivor, and could go no otherwise, unless they would have betrayed the Infant; for if he had gone by Original Bill, they must have lost the Witnesses examined on the first Bill.

Necessary to proceed by Original, and not by Revivor

War and Force, &c. *Ant.* 22, 72, 83, 126. *Post.* 190.

Lord Keeper. The War and Infancy excuses the Laches, and the Witnesses to the main were examined in Sir Humphrey's Life; and so the Pretence of the Plaintiff's Improvement, and taking off Incumbrances, nothing of that in the Bill, but in the Replication: And so dismissed the Bill.

Sherman *against* Withers. December 11.

On a PLEA.

Exception in the Statute of Limitation as to Merchants Accounts extends not to Inland Merchants. *Vide ant.* 20, 28.

The Plaintiff was an Inland Merchant, and the Defendant his Factor; And the Bill was for an Account of fourteen Years standing.

To all but what was within six Years before the Bill the Defendant pleaded the Statute for Limitation of Personal Actions, 21 Jac. 16. c. And upon Debate of the Plea, the Lord Keeper conceived the Exception in the Statute as to the Merchants Accounts, did not extend to this Case, but only to Merchants trading beyond Sea.

The Lord Keeper.

Sir Jeffery Palmer, *the King's Attorney General, on the Behalf of* Woolrich, *a Lunatick, againſt* Woolrich. Mich. 1669.

A Bill brought by the Attorney General in the Nature of an Information, for the Benefit of a Lunatick, as in the Caſe of Jerome Smith, fol. 112.

The Defendant demurred, for that the Lunatick was no Party, which was ruled a good Demurrer; the Lord Keeper declaring it was as needful to make the Lunatick a Party as an Infant, where a Suit was on his Behalf; but in the Caſe of an Ideot it muſt be otherwiſe; but a Lunatick may recover his Underſtanding, and then he is to have his Eſtate in his own Diſpoſing.

Where a Lunatick muſt be a Party to a Suit for his own Benefit. *Aliter* in caſe of an Ideot. *Vide ant.* 113. and the Caſes there cited.

But obſerve the Difference between this Caſe and that of Smith's.

Smith's Caſe was, to be relieved againſt an Act done by the Lunatick in aſſigning a Debt, becauſe he was a Lunatick at that Time; ſo that if he had been a Party, it had been to ſtultify himſelf, which the Law does not admit. Vide Beverly's Caſe, 4 Rep. And quære how it can be done by Information on his Behalf?

But in Beverly's Caſe the King hath the Cuſtody of his Perſon, of his Lands, and his Goods, ſo as to provide for the Ideot, to prevent an Alienation; and therefore by Scire facias may avoid a Feoffment and other Diſpoſition made by the Ideot. But the Book ſays, That that is not a Breach of the Rule, that a Man cannot be admitted to ſtultify himſelf, becauſe the Ideot is not Party to the Record in a Scire facias. And in that Caſe it is the ſame Thing, and the Writ the ſame as to the Alienation of Non compos mentis, or a Lunatick, or of an Ideot, and the King ſhall protect thoſe that cannot protect themſelves. And the Alienation of a Non compos mentis, as well as of an Ideot, being found by Office ſhall be avoided. Tamen quære. And upon that Ground I ſuppoſe it was thoſe Bills were grounded; for it was declared by the Court, that thoſe Bills were proper to be brought by the Attorney. And in Woolrich's Caſe the Bill was, to be relieved upon a

Where a Lunatick ſhall be a Party to an Information on his Behalf, and where not.

Marriage-Agreement, for the Benefit of the Lunatick, before he was a Lunatick; so that he being a Party to that Bill, did not tend to stultify himself, and may be the Reason why he should be a Party to it: And the other Bill tending to stultify himself, may be a Reason why he should not be a Party to it.

The Master of the Rolls, in the Absence of the Lord Keeper.

Cadwallader Jones, *Esq*; *against* John Lenthal *and his Lady*. Mich. 1669.

1 *Mod.* 141, 305. 1 *Roll. Abr.* 374. *N. Pl.* 2. Relief for a Debt which the Plaintiff had sworn was satisfied before Answer. *Vide post.* 202. 2 *Chanc. Cases* 17.

THE Bill was, to be relieved for a Debt owing by Bond from Sir James Stonehouse, to whom the Defendant the Lady was his Executrix; which Debt and Bond the Plaintiff in his Answer to a former Bill had sworn was fully satisfied to him, but that was to avoid a Sequestration of the Debt, as was alledged. And the Master of the Rolls, tho' that Answer was set forth in the Defendant's Answer in this Cause, would not suffer the Answer to be read against the Plaintiff, and so decreed the Defendants to satisfy the Debt.

For though the Rule be, *That he who has committed Iniquity*, (as here, in the false Answer) *shall not have Equity*; yet it seems, that is to be understood, when the Iniquity is done to the Defendant himself: As where a Lessee is sued at Law on a Forfeiture of his Lease, for Non-payment of Rent or the like; if such Lease was obtained by Fraud or false Suggestion, Equity will not relieve; *contra*, if no Fraud, *&c.* was done to or imposed on the Lessor. *Vide Maxims of Equity, pag.* 5 & 6. *Vide post.* 202. *ant.* 96. *Max. Eq.* 5, 45, &c.

DE
Term. Sanct. Hill.

Anno Regis 21 & 22 Car. II.

IN
CANCELLARIA.

The Lord Keeper.
Juſtice Moreton.

On a Demurrer.

THE Cauſe had been formerly heard in the Exchequer, where two ſeveral Trials had been directed, Will or no Will? and in both a Verdict for the Plaintiff. Yet the Chief Baron had diſmiſſed the Bill there, but without Prejudice in Law or Equity. And now by an Original Bill the Plaintiff hath ſought Relief here for thoſe Matters he ſought Relief in the Exchequer, and to examine Witneſſes in order thereunto, in perpetuam rei memoriam.

Matters formerly examined in the Exchequer may be re-examined in the Chancery. *Vide* 2 *Vern.* 426. 1 *Vern.* 220, 221. *New Ca. Eq.* 109.

The Defendants pleaded the Examination and Diſmiſſion in the Exchequer, and that there ought not to be a new Examination, the Matter having been there full in Iſſue.

Diſmiſſion of a Cauſe without Prejudice in Law or Equity, how to be underſtood.

On the firſt hearing of this Demurrer the Court gave Time to ſearch for Precedents, where after a Cauſe heard upon the Merits, and diſmiſſed in the Exchequer, a new Bill had been admitted here: And none being to be found, now upon farther hearing of the Demurrer, it was for the Plaintiff inſiſted, That this was a Special Diſmiſſion, it being without Prejudice either in Law or Equity; which Words muſt be conſidered to ſignify ſomething; but they did not ſignify any thing, unleſs it were meant the Diſmiſſion ſhould not hinder the Plaintiff from ſeeking his Relief in any other Court of Law or Equity. And ſo the Court did conceive, and ordered that the Plaintiff might examine any Witneſſes that were not examined in the Exchequer; and that as to the Matters examined unto there, the Plaintiff might examine the ſame Witneſſes de bene eſſe; and how far thoſe de bene eſſe ſhould be uſed, the Court would farther conſider.

The Maſter of the Rolls.

Bridget Dennis, by *Sir* Alexander Frazer *her Committee, againſt Sir* Thomas Badd, Frances Dennis *his Daughter, and others.* January 31.

An Infant's Eſtate in his Guardian's Hands applied to Payment of his Debts. *Vide* 1 *Vern.* 26, 255, 343, 295, 435.
2 *Vern.* 232, 225, 236, 342, 368, 480, 711.
New Ca. in Eq. 103, 153.

THE Caſe of Sir Thomas Badd was, That he was Guardian to Edward Dennis, (whoſe Siſter and Heir the Plaintiff is) and at fifteen Years of Age married him to the Defendant Frances, his Daughter. Sir Robert Dillington had a Mortgage of 200 l. of Part of the Infant's Eſtate, which Mortgage Sir Thomas Badd paid off, and took the ſame aſſigned to other Perſons. The Infant after, at ſeventeen Years of Age, made his Will, and the Defendant Frances his Wife Executrix. The Bill was, That tho' Sir Thomas Badd had paid off the Mortgage with the Infant's own Money, yet he now pretends it was not for the Benefit of the Infant, but that he paid it with his own Money; and for what Money he had of the Infant's, he was accountable to his own Daughter the Executrix, and ſo would leave the whole Mortgage-money ſtill on the Mortgage Lands, which belong to the Plaintiff as Siſter and Heir to the Infant.

The

The Defendant Sir Thomas Badd by Anſwer ſaid, That the Money he had paid Sir Rob. Dillington was his own Money, and that he had not near enough of the Infant's to pay the ſame, and that if he had had enough of the Infant's Money, yet he could not juſtify the Diſpoſing of it.

It was proved, That when Sir Thomas Badd paid off the Mortgage, he called in about 100 l. of the Infant's Money, and that that was applied that way.

And in this Caſe the Maſter of the Rolls declared, That Sir Thomas Badd ought to imploy what he had of the Eſtate of the Infant, as far as it would go, to pay his Debts, and did decree a Redemption of the Mortgage, and that Sir Thomas Badd ſhould account; and that what he had of the Infant's in his Hands when the Mortgage was paid off, ſhould be applied in Diſcount of Mortgage-money, and upon Payment of what was more due to the Plaintiff, to redeem.

The Lord Keeper.

Sir Jeffery Palmer, *the King's Attorney General, on the Behalf of the* King *and* Trinity-College *in* Cambridge, *againſt* George Newman, *Eſq*; February 10.

Chancery may relieve on the Stat. of Charitable Uſes. *Vide prox. pag. &c. ibid.*

THE Information ſuggeſts, That S. Newman was ſeiſeized in Fee of the Lands in queſtion, and poſſeſſed of Books and Goods, and out of a pious Intent to provide for Maintenance of poor Scholars in that College, by his Will in Writing deviſed to the Maſter and Fellows of that College, the Lands in the Information mentioned, and all his Monies, Goods, &c. and appointed the Premiſſes to be imployed for buying Lands for Maintenance of Scholars in the ſaid College, &c. with this Clauſe, That if any by Cavillation concerning the Law of Maintenance ſhould go about to hinder this Bequeſt, or if any of his Bequeſt might not be ſuffered to go to the College, then the Defendant ſhould enjoy all his Lands, Goods, *&c.* That by the Will the Premiſſes are to be eſtabliſhed with the College, but the Defendant combines with others unknown, either Lords of whom the Lands are holden, or Heirs at Law, and pretends that by the Statute of Mort-

main

main the Devise is ineffectual, and so raiseth Cavils to defeat the Charity, and so has got the Possession of the Lands and Goods, and refuseth to let the Master and Fellows have them; That if by the Statute of Mortmain the said Charity be avoidable, yet by other Laws for establishing of Charitable Uses, and according to Equity, the Charitable Use ought to be made good. Wherefore, and inasmuch as the Preservation of Charitable Uses is of Publick Interest and Concern unto his Majesty and the College, and in respect of the Statute of Mortmain and Cavillation aforesaid, they have no Remedy, by reason of the latter Clause of the Will, to be relieved in the Premisses, they exhibited this Bill.

The Defendant answered, and confessed the Will, &c.

The King as *Pater Patriæ* may inform for any publick Benefit.

And upon the Hearing it was declared by the Court, That the King as Pater Patriæ may inform for any Publick Benefit for Charitable Uses before the Statute of 30 Eliz. for Charitable Uses. But it was doubted the Court could not by Bill take notice of that Statute, so as to grant a Relief according to that Statute upon a Bill; but that the Course prescribed by that Statute by Commission of Charitable Uses, must be observed in Cases relievable by that Statute. But no positive Opinion was delivered, for the Defendant consented to a Decree, and so what was done was by his Agreement, and not the Judgment of the Court.

Statute of Charitable Uses. *Vide* 1 *Vern.* 42, 225. 2 *Vern.* 118.

Touching Charitable Uses, &c. *vide* 1 *Vern.* 42, 55, 224, 225, 230, 248, 251. 2 *Vern.* 118, 266, 387, 397, 411, 412, 414, 453, 4, 507, 597, 8, 755. 1 *Chanc. R.* 21, 92. 3 *Chanc. R.* 220. *ant.* 135. *post.* 193, 195, 267.

DE
Termino Paſchæ,
Anno Regis 22 Car. II.
IN
CANCELLARIA.

Wilmer *and his Wife againſt* William Kendrick *and* Jo. Vylet. May 17.

On a Demurrer.

Touching a defective Execution of a Power.

Vide ant. 10, 17, 23, 104.

Poſt. 160, &c. 241, 264.

1 *Chan. Rep.* 1, 138, 185.

2 *Vent.* 163, 350.

2 *Chan. Caſ.* 29, 30, 87.

2 *Chanc. Rep.* 24, 366.

1 *Mod. Rep.* 310.

1 *Vern.* 79, 85, 355.

2 *Vern.* 379, 528, 531, 542, 564, 565, 609. and *ibid.* 3, 11, 69, 132, 151, 164, 279.

WIlliam Kendrick ſeiſed in Fee of the Lands in queſtion worth 90l. per Annum, and of other Lands, in all worth 100l. per Annum, by Indenture 23 April, 17 Car. 1. conveys the Lands in queſtion to the Uſe of Thomas his eldeſt Son for Life, the Remainder to Truſtees for 99 Years, for the Benefit of Martha the Wife of Thomas for a Jointure; the Remainder of thoſe and all other the Lands (of which by that Settlement Thomas was Tenant for Life) after William's Death, to the firſt Son of Thomas in Tail; Thomas has Iſſue Martha the Plaintiff's Wife, and another Daughter, and the Defendant Kendrick, his only Son. And by the Settlement there was a Power given to Thomas at any Time, during his Life, by any Writing to convey or appoint all or any of the Lands in queſtion, being but 90l. per Annum, to any future Wife that Thomas ſhould marry, for a Jointure, or to any Child or younger Children of Thomas, ſo as that Conveyance or Appointment be made

made to commence after the Death of Martha (Thomas his Wife) for Life or Lives only of ſuch Child or Children, and for their Preferment: Thomas having no other Way to provide for his Daughters younger Children, 5 May, 1657. for Love, &c. to them, and for Proviſion of Portions for them, grants, bargains and ſells the Lands in queſtion to the Defendant Vylet, Habendum to him and his Aſſigns for the Lives of the Plaintiff Martha and her Siſter, and for their only Uſe and Benefit, to remain from the Death of Thomas Kendrick and Martha his Wife.

The Plaintiffs by their Bill ſuggeſt, That the Plaintiff Martha had no Proviſion but this, and that her Father did look upon it that he had well purſued his Power in the Grant to Vylet, or elſe that he would have taken the Wood of the other Lands of greater Value, which he knew were by the Settlement ſupra to come to the Defendant, and complained that the Defendant taking Advantage that the Power was not literally purſued, did ſtand upon it; whereas it was in Subſtance purſued, and the Eſtate granted to Vylet was leſs than by the Power Thomas had Power to grant; for by the Power he was to grant to commence on the Death of Martha his Wife only, and he made it to commence on the Death of himſelf and Martha, which was leſs than he had Power to do; and the Miſtake did happen by Reaſon that in the Settlement the Lands were limited to Thomas for Life, the Remainder in Truſt for a Jointure for Martha.

A defective Execution of a Power raiſed by a voluntary Conveyance, without Help in Equity.
Vide ant. 9, 10, 17, 18, 104. and the Caſes there cited, and *prox. pag.*

And it was charged by the Bill, That in Equity the Miſtake and Defect ought to be help'd, the younger Children being otherwiſe utterly unprovided for, and ſo to be relieved was the Intent of the Bill.

To which the Defendant Kendrick demurred, for that the Deed of Settlement, and Deed to Vylet was void in Law; and being defective in the Execution of the Power, it ought not to be ſupplied in Equity. In the Arguing of which Demurrer it was inſiſted, That both the Conveyances being voluntary, the Caſe was the ſame here as at Law, and no Reaſon to help here againſt Law at all. And it was ſaid, That if ſuch Defects ſhould be ſupplied in Equity, it would be in vain to employ Men of Skill in drawing Conveyances and Settlements, but every unskilful Man might do it as well. But if it had been a Conſideration of Money, it was admitted it might be otherwiſe.

wiſe. And it was farther inſiſted, That it did not ſeem to be a Miſtake in the Caſe, but done deſignedly; for if the Eſtate had been to commence upon the Death of Martha, Thomas's Wife, then Thomas himſelf had loſt his own Eſtate for Life after Martha.

The Court was all of Opinion, That the Law being againſt the Plaintiff (as it was admitted it was) Equity could not help the Plaintiff. Yet they did mediate with the Defendant to pay the Plaintiff Martha 20 l. for her Life.

Vide the Caſe of *Parvey* and *Bowen*, fol. 22.

And the Cauſe having been formerly argued on the Demurrer, and a Day given to the Plaintiff to produce Precedents where in like Caſe the Court had relieved: The Plaintiff produced a Precedent, 6 July, 40 Eliz. Prince and his Wife Plaintiff againſt Green Defendant, where in effect the Caſe was thus: The Father ſeiſed in Fee of a great Eſtate, by Covenant to ſtand ſeiſed, ſettles the ſame to himſelf for Life, the Remainder to his eldeſt Son, with Power to himſelf to leaſe a ſmall Part for forty Years, who accordingly made a Leaſe for the Benefit of a younger Child, which came by Aſſignment to the Plaintiff, which the Defendant, the eldeſt Son, would avoid at Law, the Power not being well raiſed by the Covenant to ſtand ſeiſed. But it appearing to the Court the eldeſt Son was greatly advanced by the Father, and that the Conveyance, which was by Covenant, was intended to be by Livery, which he was adviſed would be as well by Covenant, the Court did decree the Plaintiff ſhould hold until the Defendant evicted him by Law, and did decree the Defendant to admit the Power to make the Leaſe good in Law, if he did not prove an Intail paramount the Settlement, as he pretended.

Prince and his Wife againſt *Green*.

A Power to leaſe, raiſed by a Covenant to ſtand ſeiſed, is not good.
Vide ant. 124, 125.
4 *Leon.* 8.
2 *Vent.* 350.
1 *Levinz* 238.
Ant. 104.
Hard. 204.
2 *Chanc. Caſes* 68, 69.

A defective Power made good in Equity.

Note; Theſe Points touching defective Powers, or a defective Execution of Powers being made good in Equity, are well explained in *Maxims of Equity*, *pag.* 55, 56, 57, *&c.* Where the Caſes, *ant.* 9, 10, 17, 18, 104. and many others are cited. See alſo 2 *Vern.* 80, 376, 379, 528, 531, 542, 665.
And how far defective Conveyances, Securities, *&c.* have been made good in Equity, ſee 2 *Vern.* 3, 11, 69, 132, 151, 164, 279, 564, 609.

The Lord Keeper.
Chief Baron Hales.
Juſtice Rainsford.

Elizabeth March, Richard Chaworth *and* Henry Malory, *Executors of* Jane Duppa, *againſt* John Lee, *Senior*, *and* John Lee, *Junior*. May 30.

Of Mortgagees buying in former Incumbrances.
Vent. Rep. 2 *Part*, 337, 338.
Hardr. 173, 318.
2 *Chanc. Caſes*, 20, 35, 208, 213.
1 *Chanc. Caſes*, 36, 201.
Vide ant. 109, 102, 119, 149, 150.
Poſt. 166.

THE Cauſe coming to be heard, and argued on a Plea before the Lord Keeper, he directed a Caſe to be ſtated, and then would farther conſider of it. And now the Caſe being ſtated, it was thus:

Trin. 1669. The Plaintiffs by their Bill ſet forth, That the nineteenth of January, 1662. Henry Engliſh, by Indenture and Fine (wherein the Wife joined) conveyed to the Plaintiffs Sir Richard Chaworth and Henry Malory, and their Heirs, the Manor of Monfield in the County of Suſſex, to the Uſe of Miſtreſs Duppa for five hundred Years, as a Mortgage for the Security of 4000 l. payable the fourth of March, 1664. with Intereſt in the mean Time. That on the fourth of March, 1664. Mr. Engliſh mortgaged to Miſtreſs Duppa the Manor of Wigſel in the County of Suſſex, for five hundred Years, for Security of 3000 l. more, payable the fifth of June after, with Intereſt; and covenanted in both Deeds, that the Premiſſes were free from Incumbrances. 6 Auguſt, 1664. Mr. Engliſh acknowledged to Miſtreſs Duppa a Recognizance in this Court of 2000 l. for Payment of 1000 l. and Intereſt. The 7th of December after the 21ſt of October, 1665. (the Mortgages and Recognizances being forfeited) Miſtreſs Duppa died before Payment, having made her Will, and the Plaintiffs her Executors, who proved the ſame. Trinity Term, 1667. the Plaintiffs having brought ſeveral Ejectments, exhibited their Bill here againſt Mr. Engliſh and his Wife, That Mr. Engliſh might diſcover Incumbrances, and redeem by a Day, or that his Equity of Redemption might be barred. Whereto Mr. Engliſh and his Lady, after they had ſtood in a Contempt to a Commiſſion of Rebellion, put in their Anſwer, but did not

diſcover any Incumbrances. Michaelmas-Term, 1667. Mr. Engliſh ſuffered Judgment in Ejectment at the Plaintiff's Suit, with a Ceſſet executio 'till May after. 18 May, 1668. the Ceſſet executio being expired, Mr. Engliſh, notwithſtanding any Arguments the Plaintiffs Counſel could make, obtained an Order of this Court for ſtay of the Plaintiffs Proceedings at Law upon the Judgment in Ejectment 'till hearing, and another Order. 5 June, 1668. the Cauſe coming to be heard, the Court decreed that Mr. Engliſh ſhould pay what was due to the Plaintiffs in a Twelvemonth; or in Default, the Plaintiffs ſhould enjoy the Premiſſes diſcharged of all Equity of Redemption againſt him, and all claiming under him. 26 Novemb. 1668. the Maſter to whom it was referred to take the Account, reported 8530 l. 14 s. payable to the Plaintiffs the 6th of June, 1669. 5 Febr. 1668. the Report was decreed, and the Decree thereupon ſigned and inrolled.

The Bill farther chargeth, That the Defendants deſigning to elude the ſaid Decree, and defeat the Plaintiffs of the Benefit thereof, and of their Judgment in Ejectment, pretended that Mr. Engliſh had mortgaged to them in June 1665. in Fee, the Manor of Wigſel, for the Security of 2000 l. payable the twenty-ſeventh Day of June, 1666. which for Nonpayment was become forfeited. The Defendants having had Notice, and being acquainted with the Contents of the Plaintiffs Bill, and Proceedings thereupon againſt Mr. Engliſh, and their Securities and Titles to the Premiſſes, about a Week before the ſame came to hearing, exhibited their Bill here againſt Mr. Engliſh and the Plaintiffs to diſcover the Reality of their Securities, and what was due thereupon, and prayed Relief therein upon the Title of their Mortgage. 20 Octob the Plaintiff moved the Court again, which was between the Times of the Decretal Order, and pending the Reference to the Maſter, upon an Affidavit that Mr. Burrel and ſeveral others had Incumbrances on the Premiſſes precedent to the Plaintiffs, to diſcharge the Order of the eighteenth of May laſt, whereby their Proceedings at Law for the Recovery of the Poſſeſſion of the Premiſſes had been ſtayed, and that they might be at Liberty to proceed upon their Judgment in Ejectment to recover the Poſſeſſion, which the Court however thought not fit to grant, but continued the former Order. That the Lees by means thereof ceaſed the Proſecution of their Suit in this Court againſt the Plaintiffs, and while the

Plaintiffs were tied up by the Order of this Court from getting Poſſeſſion, bought in a Mortgage made in 1649. by Mr. Engliſh to Mr. Burrel of part of Wigſel for 1000l. and a Statute in 1656. acknowledged by Mr. Engliſh to Mr. Burrel of 800 l. for Payment of 400l. and have extended the Statute on both the Manors at not above the third Part of the Value, and by virtue thereof intend to evict the Poſſeſſion, and to pay themſelves as well the 2000 l. and Intereſt, as the 800 l. and 1000 l. and Intereſt, before the Plaintiffs ſhall have any Fruit of their Decree; and that the Defendants ought, and that the Plaintiffs have offered them upon their Payment to them the 8530 l. 14 s. and Intereſt, to aſſign their Securities; or elſe that the Defendants would accept what is due upon the Statute and Mortgage to Burrel, and thereupon aſſign them to the Plaintiffs; and yet they refuſe to do it.

And ſo to be relieved in the Premiſſes is the Prayer of the Bill.

Mich. 1669. The Plea and Anſwer of *John Lee*, Senior, with the Anſwer of *John Lee*, Junior.

THE Defendant, John Lee the Elder, to ſo much of the Bill as ſeeks Relief concerning the Manor of Wigſel, by ſetting aſide or prejudicing any Title he or the other Defendant hath, or for Diſcovery thereof until he be ſatisfied the Money in his Plea mentioned, for Plea ſaith, That about the one and twentieth of June, 1665. the ſaid Engliſh affirmed that he was ſeized in Fee of the Manor of Wigſel free of Incumbrances; and the Defendant finding him in Poſſeſſion, and believing that he was ſo ſeized, and knowing nothing to the contrary, in Conſideration of 2000 l. paid by him, took a Conveyance of the Inheritance of Fee-ſimple thereof from Mr. Engliſh, in his and the other Defendants Names, for the Security of 2000 l. payable the twenty-ninth of June, 1666, whereof no Part is paid, but the Eſtate abſolute. That the Defendant at the Time of the Conveyance, or before, had no Notice of the Plaintiffs Securities, or any of them; but long after hearing that Mr. Engliſh had incumbred the Premiſſes with the Plaintiffs Securities, and by a Prior Mortgage to Mr. Burrel for 500l. for ſecuring 1000l. which was forfeited in November, 1649. had incumbred part of

Wigſel, and in November 1655. had acknowledged a Statute to Mr. Burrel of 800 l. for Payment of 400 l. which was alſo forfeited, did by Advice of his Counſel for ſecuring the Premiſſes convey to him and the other Defendant, for 1090 l. by him paid, purchaſe in Mr. Burrel's Mortgage, and agree with him to extend the Premiſſes, and for 430 l. to aſſign the ſame as the Defendant ſhould direct. That the Statute was extended, and the Defendant paid Burrel 430 l. who aſſigned the extended Premiſſes as the Defendant did direct. That the Defendant made the Purchaſe of Burrel principally to ſecure his Title, and to protect from Incumbrances the Premiſſes conveyed to him and the other Defendant, and to reimburſe the ſeveral Sums of Money by him paid, with Damages, or at leaſt ſo much as ſhall be really due on the ſaid Burrel's Mortgage and Statute, and demands Judgment. And by Anſwer ſaith, That after this Purchaſe, and not before, he heard of the Plaintiffs Incumbrances, and heard alſo of Burrel's Mortgage and Statute; and that before he bought Burrel's Mortgage and Statute, he had Notice of ſome Proceedings by the Plaintiffs had in this Court againſt Mr. Engliſh touching the Premiſſes, but were no Parties thereto; but what the ſame were, referred to Records there, and Proceedings at Law, and thereupon by Advice of Counſel he did purchaſe the ſaid Mortgage, Leaſe and Extent, Novemb. 27, 1668. That the Agreement for the Mortgage and Statute with Burrel was intire, tho' perfected with ſeveral Inſtruments, and the Conſideration mentioned to be ſeveral, and Burrel refuſed to extend the Statute and aſſign the Extent, unleſs the Defendant paid him what was due on his Mortgage and Statute. The Defendant ſubmits, That if the Plaintiffs will let him enjoy his Purchaſe Lands free from Incumbrances, to pay him the Purchaſe Money and Damages, and will pay him what he paid Burrel, with Damages and Coſts, if he will accept it. The reſt of his Anſwer is to the Effect of his Plea.

John Lee, Junior, his Anſwer.

By his Anſwer ſaith, That he claims nothing in the Premiſſes to his own Uſe, his Name being only uſed in Truſt for the other Defendant, and had no Notice of the Plaintiffs Title along Time after the Defendants Purchaſe, and refers in all Things to the Plea and Anſwer of the other Defendant.

In

In this Caſe theſe Queries were made on the Plaintiffs Part.

Whether a Statute bought in by a Mortgagee ought to be uſed as to Lands not in his Mortgage.

I. Whether upon the paying to the Defendants what is due to them upon the Mortgage and Statute to *Burrel*, the Plaintiffs ought not to have the ſame aſſigned to them? And if not, Whether the Statute, being but an Incumbrance, and no Eſtate, ought to be made uſe of as to the Manor of *Monfield* by the Defendants, wherein the Defendants have no Eſtate, and the Title the Defendants would protect is but a Mortgage or Incumbrance, and not to protect the Title of an abſolute Eſtate?

Whether a Mortgagee ſhall protect his Mortgage by Incumbrances bought in againſt a Title he had notice of before, and under which the Party was then in Poſſeſſion.

II. Whether the Plaintiffs having Judgment in Ejectment for the Poſſeſſion long before the Defendants bought in *Burrel's* Mortgage and Statute, and after the Defendants had Notice of the Plaintiffs Title and Proceedings in this Court, and notwithſtanding their Endeavours to the contrary, being ſtayed by the Order of this Court from recovering the actual Poſſeſſion, they might be looked on as actually in Poſſeſſion? And in that Caſe, Whether ſhall the Defendants make any uſe of *Burrel's* Mortgage and Statute bought in pending the Injunction, and after the Decree againſt *Engliſh*, other than to reimburſe themſelves the Money thereon due? And if not,

III. Whether by the Defendant's getting in the Statute, in manner as is before expreſſed, he ſhall be at liberty to make uſe of it only againſt *Monfield* in the Plaintiffs Hands, and ſo force them to pay off the Penalty of the Statute, or clear the ſame, which *Burrel* himſelf could not have done, but all the Lands muſt have been charged with the Satisfaction of *Burrel's* Statute, as well thoſe in the Defendants Hands as the Plaintiffs?

And theſe Queries were made on the Defendants Part.

A Mortgagee may protect himſelf by getting in an old Incumbrance, tho' nothing be due on it.

I. Whether the Defendant *Lee*, being a real Purchaſer, *bona fide*, of *Wigſel* for 2000 *l.* from *Engliſh* then in Poſſeſſion, without any Notice of any of the Plaintiffs Incumbrances preceding to his Purchaſe, might not purchaſe in the Mortgage Leaſe of *Wigſel* made by *Engliſh* to *Burrel*, and the Extent of *Burrel's* Statute preceding to the Plaintiffs Incumbrances, both forfeited in point of Law, and protect his Pur-

Purchaſe of *Wigſel* till the 2000 *l.* and Intereſt be paid? And whether there is any Equity againſt him for the Plaintiff any way to weaken his legal Securities for enjoying his Purchaſe till the 2000 *l.* and Intereſt be paid, admitting that nothing had been due on *Burrel*'s Mortgage or Statute in Equity, and the Defendant had paid nothing for purchaſing in that Mortgage and Extent?

II. Whether the Defendants having paid to *Burrel* 1520 *l.* for the Mortgage, Leaſe, and Extent of the Statute, ſhall be reſtrained from taking the Benefit of the Law by the ſaid Mortgage, Leaſe, and Extent, ſo far upon any the Lands of *Engliſh*, in the Hands of the Plaintiff or any others, to recover what he really paid to purchaſe in the ſame, ſo as they after ſuch Satisfaction make no other Uſe of the ſaid *Burrel*'s Mortgage or Extent, than only to protect his own Purchaſe Lands till the 2000 *l.* and Damages be ſatisfied?

Whether a Mortgagee buying in an Incumbrance that chargeth other Lands alſo, ſhall be reſtrain'd from his legal Courſe to reimburſe himſelf the Money paid for that Incumbrance, ſo as he uſe it only to protect his Mortgage.

III. Whether the Defendant having paid his aforeſaid Purchaſe for a valuable Conſideration, without Notice of the Plaintiff's Incumbrances, and by Anſwer offers to take the Mortgage-Money and Damages, and the Money paid for *Burrel*'s Mortgage, and Extent, and Damages and Coſts, and quit the Whole, or elſe to enjoy the Mortgage free from Incumbrances, and be paid what he paid *Burrel*, with Damages and Coſts, and make no further Uſe of *Burrel*'s Extent, than only to protect his purchaſed Lands from Incumbrances; that a Court of Equity ſhall give any further Relief againſt him to his Prejudice, being a Purchaſer, without Notice; and if any, what Relief?

IV. Whether the Defendants, who are no Parties to, nor at all concerned in the former Suits between the Plaintiffs and *Engliſh*, or concerned in any of the Orders or Proceedings therein, ſhall be in any Sort affected with, or prejudiced by any of thoſe Orders?

The Court unanimouſly agreed, That the Defendant ought not in any Sort be impeached in Equity as to Wigſel, but might keep his Statute and Security on foot to protect his Mortgage; and that the Proceedings in Chancery againſt Engliſh by the Plaintiffs, did not at all influence

this

this Caſe. But as to the Manor of Monfield, in which the Defendants had no Eſtate before they bought in the Statute, the Court inclined that ſo much of Wigſel as was not in Burrel's Mortgage (for he could not extend on himſelf) Monfield ſhould be accounted for at the real Value, in order to diſcharge Monfield of the Extent, but not ſo as to prejudice the Extent in Courſe of Law as to Wigſel; but that the Statute ought to protect Wigſel as far as by any Courſe of Law it might.

2 *Vent.* 338, 339. *Hardreſs* 136. 2 *Chanc. Caſes* 213. *Vide ant.* 2, 3, 102, 109, 119, 150, 162, 166. *Poſt.* 201, 202, 218.

On the Argument of this Caſe was produced Higgon againſt Udal, and Medleton againſt Shelleh, 19 June, Car. I. for Precedents.

On the Hearing of that Caſe, which was a parallel Caſe, the Court would be ſatisfied there by Precedents before they would give any Relief againſt Purchaſers in of Incumbrances to protect a real Title, and the Cauſe went no further here. But the Plaintiff, as the Chief Baron now ſaid, brought his Bill in the Exchequer afterwards, and was there diſmiſſed.

And in the principal Caſe the Plea was allowed.

In what Caſes Mortgagees may protect themſelves by buying in of former Incumbrances, *vide ant.* 2, 3, 102, 109, 119, 150, 166. *Poſt.* 201, 202, 272. 1 *Vern.* 29, 41, 49, 52, 187, 244, 245, 335 464, 476. 2 *Vern.* 370, 525, 29, 30, 66, 81, 157, 159, 160, 271, 304, 524. *New Chan. Caſes* 38. 2 *Chanc. Rep.* 247, 361.

DE
Term. Sanct. Trin.
Anno Regis 22 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
The Maſter of the Rolls.

Hurſt *againſt* Goddard. June 7.

Things in Action aſſignable in Equity, and how.

THE Caſe was thus: There was a Sum of Money provided by a Settlement of Lands to be raiſed for Daughters Portions; one of the Daughters marries and dies before her Portion paid; her Husband takes Adminiſtration to her, and aſſigns all his Intereſt in that Portion to his Son by a former Wife. The Son by this Title (the Father being dead) ſues in Equity for this Money.

Poſt. 232. 2 *Chanc. Caſes* 7, 37. 2 *Vern.* 401, 563, 595, 692, 765.

It was inſiſted for the Defendants, That though Things in Action might be aſſigned here on a Conſideration by the Party that had the Intereſt, and were recoverable here by the Aſſignee; and that a Releaſe afterwards by the Aſſignor, unleſs it were without Notice and on Conſideration to him to whom the Releaſe was, would not hurt the Aſſignee; yet here the Aſſignment being by an Adminiſtrator,

and not the Perſon that had it in his own Right, this had never been good, for there might be a Creditor to ſatisfy the Inteſtate, &c.

The Lord Keeper did think there was a conſiderable Difference between the Aſſignment of the Party and of the Adminiſtrator, where the Adminiſtrator was a Stranger, or had not Right before, and no Colour of Right but meerly by the Adminiſtration. But here in this Caſe the Adminiſtration was pro forma only, for here he had a Right to the Money, as a Portion or Proviſion for his Wife, and every Man hath not ready Money to give Daughters, but their Portions are to be provided for by this Means, and therefore it is reaſonable to advance or promote the Eſtabliſhing of them, ſo that they might be diſpoſable by the Husband (who ſettles a Jointure) as Money it ſelf may be. And ſo decreed for the Plaintiff.

The Lord Keeper.
The Maſter of the Rolls.

Martin *againſt* Seamore. June 13.

A Surrender of Copyhold void for Want of Preſentment; yet made good againſt a voluntary Diſpoſition.

See defective Surrenders, &c. made good in Equity.
1 *Vern.* 69, 132, 195
2 *Vern.* 16, 163, 164, 265, 321, 367, 585, 680, 705.

Robert Seamore being ſeiſed of the Lands being Copyhold, in Fee, ſurrenders them to the Plaintiff by way of Mortgage, for Money lent, and in a few Days after ſurrenders them to the Uſe of his Will, and then by Will deviſeth them to his Wife for Life, Remainder to his Daughter in Fee, and dieth. There was a Failer to preſent the Plaintiff's Surrender at the next Court; but the Wife got her ſelf admitted.

The Plaintiff's Bill was to be relieved for this Mortgage Money, and ſet aſide this Surrender and Will, being voluntary, unleſs the Wife and Daughter would pay him.

For the Wife it appeared, there was an Agreement of the Husband, in Conſideration of the Marriage, to ſettle the Premiſſes on her for Life, and inſiſted that the Will and Surrender to her was purſuant to that Conſideration and Agreement.

For the Plaintiff it was inſiſted, That if a Copyholder for Money had agreed to ſell or mortgage his Copyhold, that by ſuch Agreement he ſtands truſted for the Vendee, and that no voluntary Diſpoſition afterwards could prejudice the Vendee, nor no Diſpoſition for Money with Notice of that Agreement: And that the Plaintiff having a Surrender ought not to be in a worſe Caſe than if he had only an Agreement.

A Copyholder having for Money agreed to mortgage Lands ſtands truſted for the Mortgagees. 2 *Vern.* 321, 585, 705, 680.

Court. As to the Wife ſhe being in purſuant to a precedent Agreement to the Plaintiff's Title, would not impeach her Eſtate. But as to the Daughter, hers being purely a voluntary Eſtate, It was ordered, that unleſs ſhe would pay the Plaintiff his Money he ſhould hold and injoy the Premiſſes againſt her.

And note; The Widow of a *Ceſtuique Truſt* of a Copyhold ſhall have her Free-bench, as if her Husband had been poſſeſſed of the legal Eſtate. 2 *Vern.* 585. *vide ib.* 680.

The Lord Keeper.
Juſtice { Twiſden. Wyld. Rainsford.

Roſs *againſt* Roſs. July 14.

THE Caſe was this: Francis Roſs had Iſſue James his lawful Son, and John a Baſtard Son, and deviſeth by his Will in Writing to his Baſtard Son in Tail Lands that were held in Capite, and ſuffers Copyhold Lands to deſcend on James. James and John agree, that John and his Heirs ſhould enjoy the Copyholds, and James and his Heirs the deviſed Lands.

Tenant in Tail bound by his Agreement to convey.

This Agreement being executed, James had a Decree againſt John to levy a Fine, and ſettle it accordingly. John dies in Contempt for not doing that (which if he had done the Eſtate Tail had been barred). The Defendant, the Iſſue of John, entred into the Copyholds, and enjoyed them: And to force him to execute the Agreement was the Intent of the Bill.

2 *Rol. Rep.* 434. 2 *Vent.* 350. 1 *Lev.* 239. *Hob.* 203. 1 *Rol. Ab.* 379. *Pl.* 7. *Poſt.* 235, 236, 294.

Maynard for the Defendant. Its not like the Caſe of Octavian Lumberd, for by that Agreement the Eſtate Tail was made good, which otherwiſe would have been avoided; but a perſonal Agreement, or Agreement for other Lands will not bind the Iſſue.

The Iſſue in Tail is not bound by the Agreement.

Iſſue in Tail accepting the Satisfaction agreed to be given, the Tenant in Tail is bound by that Means.

Reſolved by the whole Court, 1. That if the Tenant in Tail agree to convey, he is bound by that Agreement.

2. If he die, his Iſſue is not bound by it.

3. That if the Iſſue do accept of that Agreement, and enters, as in this Caſe, on the Land, it now becomes his own Agreement, and ſhall bind. And ſo decreed it againſt the Defendant.

The Lord Keeper.

George Stowel, *Eſq*; *againſt* George Long *Executor of* George Long. June 14.

A Creditor of a Delinquent having his Debts allowed him in the Purchaſe of the Delinquent's Eſtate, ſhall not be put to Account for the Profits under the Purchaſe in Diſcharge of his Debt.

Cf Creditors and Mortgagees accounting, &c. *vide ant.* 3,102,109,119. *Poſt.* 303. 1 *Vern.* 45,179,194, 258, 267, 270, 316, 296. 2 *Vern.* 527,724,392.

SIR John Stowel (whoſe Heir the Plaintiff is) was indebted to the Defendant's Teſtator by Judgment and Counterbond, the Defendant's Teſtator having paid the Debts he was bound in as Surety for him. Sir John was ſequeſtred, and his Eſtate expoſed to Sale by the Parliament for his Loyalty to the late King. The Defendant's Teſtator bought a Farm of the Truſtees for Sale, Part of Sir John's Eſtate, and in the Purchaſe had Allowance of his Debt by Judgment and on the Counterbond, and paid the Reſt of the Purchaſe Money, as was uſual, by Bills, &c. The Defendant's Teſtator's Purchaſe was in 1652. and he entred and held till 1660. the King's Reſtauration. He being dead, the Plaintiff who claimed under Sir John Stowel, exhibited a Bill to call the Defendant to an Account, and ſuggeſted, that the Land was conveyed by the Truſtees in Satisfaction of the Judgment, and that by the Profits taken the Judgment was ſatisfied, and therefore the Plaintiff ought to hold the Lands againſt the Judgment which was extended for the Defendant.

It was inſiſted, That for all the Profits the Defendant's Teſtator took under the Sale, it was pardoned by the Act of Indempnity: And that the Defendant's Teſtator, beſides this Judgment and this Bond, paid a great Sum of Money for the Purchaſe. And yet it was offered to come to an Account, if the Plaintiff on Account would pay the Defendants the Debt due by Judgment and on the Counterbond, and the Money paid for the Purchaſe. And upon that Offer the Court decreed it to an Account. Though

it was for the Plaintiff strongly opposed, that the Debt Sir John owed him by Counterbond (it not being within the Judgment) should not be brought into the Account, or allowed the Defendant. But inasmuch as that Debt was allowed the Defendant as Part of the Consideration in the Purchase of the Estate, the Lord Keeper did order that to be brought into the Account and allowed the Defendant, and declared, that if the Defendant's Counsel had not offered to account, he would not have ordered an Account, for that all Monies recieved by the Profits are pardoned by the Act of Oblivion.

Troner *against* Hassold. June 16.

THE very same Case with that of Wembergh and Tough before fol. 123. save that the Debt was by Bond, and entred into here. And upon a Demurrer the Lord Keeper ordered the Defendant to answer; but saved the Benefit of the Demurrer to the Hearing.

Whether Articles of Peace can discharge a Subject's Debt.
Ant. 123, 124.

The Lord Keeper.

Dame Flora Backhouse *against* Simon Middleton *and others.* June 17.

SIR William Middleton seized of the King's Moiety in the New River Water in Fee, consisting of thirty-six Shares, 1646. conveyed the same to Henry Middleton and others, upon Trust for himself and his Wife, during their respective Lives, and after that the Trustees out of the Rents and Profits of the Premisses should pay his Debts and Portions for his Daughters at certain Days, and after to permit Sir Hugh Middleton Heir of Sir William and his Heirs, to take and receive the Rents and Profits of the Premisses. Sir William and his Lady die. Sir Hugh in June, 1657. contracted with William Bishop, former Husband of the Plaintiff, for Sale of fourteen Shares to him of the King's Moiety for 7000 l. whereof 250 l. in Hand, and the Rest to be paid as Sir Hugh and Bishop and the Trustees should agree, for the Daughters Portions, which

Cestuyque Trust of a Surplus.
Ant. 8, 39.
Post. 175, 197, 208.
2 *And.* 162.
2 *Chan. Cas.* 30, 63, 64, 78.
1 *Vern.* 60, 84, 149, 226, 440, 484.
2 *Vern.* 50, 106, 104, 132, 133, 334, &c.

which are ascertained by Sir William at several great Sums. In December 1657. the Defendant Simon contracted with the same Sir Hugh by Articles under Hand and Seal, for all the King's Moiety at 15100l. and in January after Sir Hugh and his Wife and Henry Middleton (the only active Trustee) execute a Conveyance to Simon according to the Articles. In Hillary, 1657. Bishop exhibits his Bill against Sir Hugh to inforce an Execution of the Agreement, which the Defendant answered. Hillary, 1658. Simon Middleton brought his Cross Bill against Bishop, Sir Hugh and the Trustees to have a Conveyance, &c. February, 1659. Bishop exhibits Interrogatories in his Cause. Nov. 1660. one Witness sworn thereon. 4 March, 1660. Bishop dies, yet the Witness sworn not examined, Bishop having devised the Benefit of his Contract to the Plaintiff, being his Wife, and her Heirs. 24 January, 1661. she brings a Bill of Revivor. 24 November, 1662. she marries Sir William Backhouse, and so her Suit abates. 27 November, 1663. Simon Middleton's Cause heard and decreed for him. 1 December, 1663. Sir William Backhouse by Petition gets Simon Middleton's Decree stopt. 2 Decemb. 1663. he brings a Bill of Revivor in his own and his Wife's Name. 18 May, 1664. he exhibits a new Schedule of Interrogatories, and on those Interrogatories some Witnesses are examined. 11 June, 1664. this Cause was heard, and the Plaintiffs claiming as Devisees to the Plaintiff in the first Cause, and the Heir of Bishop, whom only it concerned to contest, the Devisee being no Party; and a Devisee not being intitled to a Bill of Revivor, this Bill was dismist without Prejudice to a new Bill.

A Devisee cannot bring a Bill of Revivor, not being in Representation to the Devisor, but in Nature of a Purchaser.
Vide ant. 37, 150, 152.

Then an Original Bill, setting forth the former Proceedings and the former Dismission, was exhibited by Sir William Backhouse and the Plaintiff his Wife, which also abated by Sir William's Death, and was revived by the Plaintiff, and answered by the Defendants. And then Issue being joyned, the Plaintiff moved to have the Use of the Depositions taken upon the former Bill, which was dismist, made Use of in this Cause, those Witnesses being dead.

This Matter was several Times strongly debated by Counsel on both Sides, where for the Plaintiff it was insisted, That though a Bill be dismist, yet the Depositions taken on such Bill are to be made Use of here or at Law, and that the Bill was not dismist on the Point of Right,

but for Matter of Form. And that it is usual and frequent to use Depositions taken in one Cause, if for the same Matter that is in Controversy in another, especially if against the same Defendant, as here it is; which was admitted by the Defendant's Counsel. But as to the Using of Depositions in a Cause dismist, this Difference was taken; that though where a Cause is dismist, the Matter of it not being proper for Equity to decree, yet the Fact in this Cause proved may be used as Evidence in that Fact between the same Parties when ever it shall come in Question again. But when a Cause is dismiss'd not upon that Ground, but upon Irregularity, as for that it comes by Revivor when it should come by original Bill; so that in Truth there was never regularly any such Cause in the Court, and consequently no Proofs, these Proofs cannot be used; for Proofs cannot be exemplified without Bill and Answer; nor can they be read at Law, without the Bill, on which they were taken, can be read. But this Bill of Revivor could not be read at Law, and therefore the Proofs taken upon it cannot be used here. And so upon long Debate, and after several formal Arguments it was ruled about Michaelmas Term 1669. in this very Cause by the Lord Keeper.

When Depositions in a Cause dismist, shall be used or not.

Ant. 73, 25. *Post.* 233, 236. *Kel.* 96. *a.* 6. 100. *a.* *Hard.* 180. *Post.* 229.

And now upon the Hearing of this Cause, the Endeavour on the Plaintiff's Part was to prove a Notice in the Defendant of Bishop's Contract, which was opposed by the Defendant. But the Notice being proved, it was for the Defendant insisted, that there was no Ground to decree the Agreement made by Bishop, it being made by a Cestuy que Trust of the Surplus only, and the Trustees no Parties, and the second Agreement by the Defendant Simon Middleton is exempted before any Bill brought by Bishop against the Cestuy que Trust; and the principal Trustee, who being examined as a Witness swears that he did disapprove of the Agreement with Bishop, and would never consent to it. And it was farther insisted for the Defendant Simon, that the Agreement with Bishop was not pursued, nor could Sir Hugh inforce the Payment of the 6750 l. it being to be paid as the Trustees and he should agree, so that that was no compleat Agreement; and the Trustees disagreeing, and having executed the other to Simon the Defendant, the Agreement with Bishop ought not now to be decreed, especially for the Plaintiff, who claimed the Benefit of it by Devise only, which at the best was a Devise of an Equity on an Equity.

An Agreement for the Purchase with the *Cestuy que trust* of the Surplus not good, unless the Trustees are Parties.

But

But for the Plaintiff it was inſiſted, That the Truſtees had not by the Truſt Power to ſell, they being to pay the Daughters Portions out of the Rents and Profits.

A Truſt to pay Portions out of Rents and Profits at prefixt Days gives the Truſtees Power to ſell.
Vide 1 *Vern.* 104, 256.

To which it was replied by the Court, that the Truſtees were not to pay the Portions out of the annual Rents and Profits, but out of the Rents and Profits, and thoſe Portions were to be paid at prefixt Days, which the annual Profits would not do; and therefore conceived the Truſtees might ſell for that Purpoſe within the Intention of the Truſt; and ſo declared he was of Opinion to diſmiſs the Bill; but withal ſaid he would think farther of it. Vide the End of this Cauſe in Cornbury againſt Middleton.

The Lord Keeper.

Pitt *and others againſt* Pelham *and his Wife, and* Mabel Shirly. July 4.

Deviſe of Lands to be ſold, *&c. Quær.* Who ſhall ſell? *Reſp.* 1 The Truſtees. 2. The Executors, or 3. the Heir.
Vide ant. 34.
1 *Chanc. Rep.* 283.
2 *Chanc. Caſes* 144.
1 *Vern.* 28, 29, 63, 69, 99, 100 to 104, 204, 256, 431, 482.

William Shirly ſeiſed of the Lands in Queſtion, ſettled them on Jane his Wife for a Jointure, Remainder to the Heirs of their two Bodies, Remainder to his own right Heirs. Afterwards in 1657. he made his Will in Writing in theſe Words, I make my dear Wife my ſole Executrix: My Land at *Blandford*, which is my Wife's Jointure (which is the Land in queſtion) I confirm unto her; and after her Death I appoint it to be ſold, and the Money that is made of it, to be divided in equal Portions amongſt theſe four, namely, one Part of it to be diſpoſed of by my Wife, and one to *William Major*, one to *Ezra Shirley* (who was Heir at Law) and one to *Jonadab Savidge*; and in caſe any of my three above named Nephews ſhall die before the Death of my Wife, my Couſin *Roger Higham* ſhall have the Portion of Money, which upon ſelling my Land at *Blandford* ſhould have fallen to that Nephew, and dies, leaving Ezra his Heir. Ezra Shirly dies before Jane, leaving the Defendants the Women his Siſters and Co-heirs. Jane the Executrix, Major, Savage and Higham in 1663. exhibit their Bill againſt Mary and Mabel the Defendants, to prove the Will, and compel them to ſell. They anſwer, and in 1664. Witneſſes are examined. Pending this Suit, the now Plaintiff being only Tenant to Part of the Lands from Year to Year, purchaſes of Major, Savage,

vage, Higham and Jane, their Interest given them by the Will. Jane dies in 1666. and makes Higham and Harris her Executors; the now Plaintiffs Pitt, Major, Savage, Higham and Harris exhibit their Bill to compel the Coheirs to convey the Land to Pitt and his Heirs.

The Cause was first heard before the Master of the Rolls, and it was then ordered a Case should be drawn up and heard before the Lord Keeper.

And on Hearing before the Lord Keeper 7 Novemb. 1668. because the Cause appeared to be of Weight and Consequence, his Lordship ordered Copies of the Case to be delivered to Justice Twisden and Justice Wild, and will advise with them and appoint a Day to deliver his Opinion.

29 April 1669. the Cause was heard by his Lordship, assisted with those Judges, at which Time it was by Serjeant Maynard insisted for the Plaintiff, that the Will was good in Law if the same was executed, but could not compel an Execution at Law, and therefore Equity ought. And as to the Pretence that there was no Person named to sell, he said, that when the Intention is clear, all Means without which that cannot be attained must be supplied by a Court of Justice, Dyer 371. b. 2 Leon. Rep. 220. a Case in Point, and the Devisor hath Power to dispose as he pleaseth: And though the Devise be not of an Estate, but of an Authority to sell, it is good within the Statute. And if a Devise be to an Heir upon a Condition that he sell, this Condition is void; but yet it is good by way of Trust in Equity, for it lies within the Power of an Ancestor to charge his Lands with a Trust, and the Heir must sell. And the Precedents of the Court do run, that the Heir is to sell, and cited Batersby and Prince in the Lord Coventry's Time, and Tennant against Brown, 18 Feb. 1659.

When the Intention is clear, Equity will supply the Means to attain. *New Equity Ca.* 9, 159.

A Devise to an Heir on Condition, void in Law, yet good in Equity. *Quære* 1 *Vern.* 431.

Serjeant Fountain for the Plaintiffs. Originally this is a good Will, and the Land might have been sold; and if by any Accident it be prevented, as by the Death of the Executor, this Court ought to help it. And it is not denied, that if the Will had been to sell to pay Debts, it had been good, and the Heir should have sold: And there is no Difference between Debt and Legacies, and here the Money is given for Legacies, but shall be raised by the Sale; and he relied on it, that the Executor might have sold.

Mr. Solicitor Finch for the Defendants. There are two Questions: 1. What the Law is? 2. What the Equity? The Law is against the Plaintiffs. If Land

When Lands are appointed to be ſold, and no Perſon appointed to ſell, the Executor ſhall ſell.
Vide ant. 176, *&c. ibid.*

be appointed to be ſold for Payment of Debts, and no Perſon is appointed to ſell, the Executor ſhall ſell, becauſe the Soul is concerned, which the Executor is to take Care of. But it is otherwiſe in a voluntary Diſpoſition, as here; and it is not like the Caſe of Howel and Barns, 1 Cro. 382. for there the Executors were appointed to ſell.

Serjeant Ellis for the Defendants. The Deviſe is a void Deviſe in the Creation, becauſe no Perſon is appointed to ſell; or if good in the Creation, is void ex poſt facto, for no Bond of the Anceſtor binds the Heir, unleſs he be expreſly named.

The Lord Keeper doubted whether the Will be void in the Creation; for it is againſt a Rule in Law, to make it void, if by any Conſtruction it can be made good.

Twiſden doubted that the Executor of the Executor cannot be compelled to ſell in this Caſe, the Sale not being to be made till after the Death of the Executor.

Wyld conceived the Deviſe good in the Creation, the Intent appearing; and the Caſe in Leonard is the very Caſe, and was of Opinion, that the Executor of the Executor ſhall ſell; but doubted whether the Heir be compelled to ſell.

Precedents on both Sides were given in to the Lord Keeper and the Judges. And 18 May, 1669. the Lord Keeper, after Advice with the Judges in order to the Determination of the Cauſe, ordered a Trial of theſe Points in a feigned Action.

1. Whether Jane the Executrix had Power, and could by the Will have ſold the Lands?

2. Whether a Sale by her Executors (admitting ſuch Sale to be actually made) be a good Sale?

And after Trial either Party to reſort to the Court for a final Determination.

Upon the Trial, by Conſent of Counſel, a ſpecial Verdict was found, and upon ſeveral ſolemn Arguments thereon by Counſel on both Sides at the Common Pleas, the Court gave Judgment unanimouſly on both Points for the Defendants. Thereupon the Defendants move to diſmiſs the Bill. And it is ordered that the Cauſe be ſet down for Hearing before the Lord Keeper, upon the Equity reſerved.

And now upon Hearing thereof before his Lordſhip, it was for the Plaintiff inſiſted, that it was plain by the Will that the Lands ſhould be ſold, and no Perſon by Law can

ſell but the Heir, and therefore the Heir muſt ſell; and that Matter was not tried, but the Matter tried was improper, for it was not to the Purpoſe. And the Precedents of the Court run, that the Heir ſhould ſell, and therefore though the other Iſſues tried are againſt the Plaintiff, that is not, but remains in Juſtice for the Plaintiff; and cited divers Precedents, viz.

Hughs *and others Plaintiffs, againſt* Collis *Defendant.* 1 Feb. 16 Car. I.

Hughs againſt *Collis.*

The Caſe was thus: The Plaintiffs were Creditors of the Teſtator. The Defendants were his Executors, and Daughters Legatees. The Bill was to inforce the Sale of the Teſtator's Lands for Payment of his Debts by the Executors (who by Anſwer ſubmit to ſell, if the Court thought fit, having in truth ſold Part before.) And the Words of the Will were thus: As for my Lands, Tenements, Goods and Chattels, I give and bequeath, as followeth: After my Debts paid, to my five Daughters 100*l.* apiece, and to be paid at their Ages of twenty Years: Alſo I give to my Wife, whom I make my Executrix, all the reſt of my Lands and Tenements, Goods and Chattels. The perſonal Eſtate was not ſufficient to pay the Debts, nor could the Executrix out of the Profits of the Premiſſes, being but 63 l. per Annum, raiſe Money to pay the Debts and the Daughters Portions, being 500 l. Therefore the Court conceived it was intended by the Will, that the Executrix ſhould raiſe Money to pay the Debts and Legacies, and decreed the Executrix to ſell accordingly, and by Sale to ſatisfie the Plaintiffs; but before the Executrix was to receive any Part of the Purchaſe-Money, ſhe was to give Security to pay the Daughters their Portions at their Ages of twenty Years (they being then in their Infancy), and that the Daughters ſhould, when they came of Age, releaſe the Lands to the Purchaſer.

Portions deviſed out of Lands payable at prefix'd Days, which the Premiſſes will not do, amounts to a Deviſe to ſell.

Another Precedent was,

Lockton *againſt* Lockton. 13 Nov. 13 Car. I.

Lockton againſt *Lockton.*

Where Lands were deviſed to be ſold, and the Monies to be diſtributed to ſeveral Perſons, and no Perſon was named to ſell, there by Conſent of Counſel it was decreed that the Executor ſhould ſell.

Another Precedent.

Asby *and others, Creditors of* Walker, *againſt* Doyl *and others, Heirs of* Walker.

The Words of the Will were theſe: My Will and Mind is, and I do hereby authorize that my Executors hereafter named ſhall ſell my Lands and Woods thereupon growing, to any Perſon or Perſons, and their Heirs, for the beſt value, and with the Monies thereby raiſed to pay all my juſt Debts. 16 Febr. 1655. The Lords Commiſſioners, aſſiſted with Judges (the Executors being dead), upon View of Precedents decreed the Heirs to ſell.

Tenant againſt *Brown.*

Tenant *and others againſt* Brown *and others.* 18 Feb. 1659.

The Executor of an Executor to ſell when the Executor fails to ſell.

The Sale being to be made expectant upon a Contingent Eſtate, which did not happen in the Executor's Time, that was decreed to make the Sale; but happening after his Death, his Executor, and thoſe that claimed the Land after his Death, decreed to ſell.

And for the Plaintiff in the original Caſe it was ſtrongly inſiſted, that it was all one where Lands were deviſed for Payment of Legacies or younger Childrens Portions, and for Payment of Debts, and that was as much a Truſt of Lands in the principal Caſe that it ſhould be ſold, and the Money paid, as it is where Monies are appointed to be paid out of the Profits of the Lands.

Edwards againſt *Groves, Hob.* 265. Whether the Heir ſhall be forced to ſell Land deviſed to be ſold after the Death of the Executor, when no Party is named to ſell. A Difference between a Deviſe of Money out of Profits of Lands, and of Money raiſed by Sale of Lands.

The Lord Keeper. This is not like the Caſe where a Father makes Proviſion for younger Children; for a Parent is bound to provide for them; nor is it like to the Caſe of a Sale to pay Legacies at large; but here they are Sums in groſs; and conceived a Difference may be taken between the principal Caſe and Monies appointed to be raiſed out of the Profits of Lands, that doth not amount to a total Diſheriſon, but only a Charge upon the Land in the Heir's Hand, and ſo that favours more of a Truſt than in the principal Caſe; and ſo decreed the Bill to ſtand diſmiſſed; but with Directions, that this ſhould be no Precedent.

The Lord Keeper.
Justice Twisden.
Justice Wyld.

Pheasant *and others, Executors of* Walter Pheasant, *against* Anne Pheasant, *the Relict of* Walter Pheasant, *the Mayor and Commonalty of* London, *and the Chamberlain.* July 4.

Vent. Rep. 340. The Custom of *London* touching Orphans Portions, *&c. vide post.* 199, 285, 310.

WAlter Pheasant having taken to Wife the Defendant Anne, who was an Orphan, and had her Portion in the Chamber of London, after his Marriage took out 40 l. thereof, and by Will gives his said Wife her Portion in the Chamber of London, being 2800 l. and other Things to the Value of 1000 l. on Condition she renounce her Dower. She accepts this Legacy before and after her Husband's Death. The Bill was to perform the Will and to renounce and release her Dower. She hath a cross Bill for her Portion in the Chamber of London against the Executors of her Husband, the Mayor and Commonalty and Chamberlain, and insists that her Portion belongs to her in regard the Security was unaltered by her Husband in his Life-time, and so was as much as if it were a Debt due to her by Bond, and sought to recover her Dower besides.

For the Executors it was insisted, That the Monies in the Chamber of London is not there as a common Debt, but rests in the Husband by Marriage, it being only deposited to remain there 'till the Orphan comes of Age, which she attained during the Coverture. And it was also insisted, that the receiving of 40 l. out of it is an Alteration of the Property, and owning of the Husband's Right to the whole; and that however she was concluded by the Acceptance of her Legacy in lieu of her Dower. And it was said that the Mayor and Chamberlain have only the Custody of the Child, but not the Property of her Money, but that is in custodia Legis until she comes of Age, and is only depositum, and not debitum in the mean time; and it would be inconvenient if the Property of

the

the Portion did not veſt in the Husband by Marriage; for by the Marriage the Woman becomes dowable.

The Portion of an Orphan in the Chamber of *London* is of ſuch a Nature, that if the Husband die without altering the Property, his Widow, and not his Executors ſhall have it. *Vide* 1 *Vern.* 88.

The Lord Keeper conceived the Money in the Chamber of London is a Debt, for the Chamber pays Intereſt for it, and if ſo, her Acceptance of the Matters deviſed to her will not bar her Dower according to Vernon's Caſe, 4 Rep. The Acceptance of a collateral Satisfaction is no Bar in a Writ of Dower; and ſo conceived Anne Pheaſant is intituled to the Money in the Chamber of London, but ſaid he would conſider of it.

The Acceptance of a collateral Satisfaction for Dower no Bar of Dower.

And 30 Octob. 1670. for the Executors of the Husband it was inſiſted, that the Mayor and Commonalty have but the Cuſtody of the Body and Goods of the Orphan, New Entries 346. And ſo the Property is in the Orphan; and the Orphan hath in Truth a legal Poſſeſſion, the Chamberlain being in the Nature of a Servant to the Orphan; and Poſſeſſion of the Servant is Poſſeſſion of the Maſter, 1 Cro. Jac. 37. So that by the Marriage this Money is the Husband's. As if an Infant Feme bring Money into this Court, and marries, and dies, the Property is in the Infant, and by Marriage becomes the Husband's. But it was anſwered, that was not like the principal Caſe; for here the Chamberlain pays Intereſt, &c. but no Intereſt is payable for Money in Court; and the Property here is in the Infant. And ſo all agreed the Monies belong to the Widow, and not to the Executors.

DE
Term. Sanct. Mich.
Anno Regis 22 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Tall *againſt* Ryland. October 13.

On a Demurrer.

THE Plaintiff and Defendant were Fiſhmongers, and had contiguous Shops; and Differences having been between them they were made Friends, and by that Mediation the Plaintiff was to give, and did give the Defendant a Bond of 20l. Penalty, conditioned to behave himſelf civilly and like a good Neighbour to the Defendant, and not to diſparage his Goods. The Plaintiff afterwards asked the Defendant's Cuſtomer, whilſt cheapning a Parcel of Flounders, why he would buy of the Defendant, and told him thoſe Fiſh ſtunk, and ſo the Defendant loſt that Cuſtomer; and the Defendant having ſued the Bond, and aſſigned that for Breach, had a Verdict. And to be relieved againſt that Verdict and the Penalty of the Bond was the Prayer of the Bill, which alledged that the Damage was not conſiderable nor valuable, and therefore the Plaintiff ought to be relieved againſt the Verdict for the Penalty.

No Relief in Equity againſt a Bond not to diſparage another's Goods; for the Breach of the Condition does not lie in Compenſation.
Vide ant. 52, 110, 170.
1 *Sid.* 442.
1 *Vern.* 60.
2 *Chanc. Caſes* 198, 219, 241.
New Caſes in Law 56, 57.

The

The Defendant demurred, for that the Bond was not conditioned for Payment of Money or Performance of Covenants, or for any Matter for which Damages in an Action of Debt, Covenant or any other Action, was recoverable; nor was there any Way to measure the Damages but by the Penalty.

Post. 226. 1 *Sid.* 442.

And the Bond being to preserve Amity and neighbourly Friendship, for the Breach of which the Plaintiff did submit to pay that Penalty, and there can be no Trial had to measure the Damages for Breach of the Condition, other than the Parties have submitted to.

No Relief to be given against a penal Bond, where there is no Measure to ascertain the Damages for the Breach. *Vide post.* 226. and the Cases there cited, and in *Maxims of Equity, pag.* 50, 51.

His Lordship declared, That as this Case was, the Penalty being but 20 l. he did not think fit to put the Defendant to answer, for that the Costs of Suit here and at Law would exceed the Penalty, and so the Demurrer was allowed. But his Lordship declared this was not to be a Precedent in the Case of a Bond of 100 l. or the like; and tho' the Demurrer was allowed, the Defendant was to have no Costs.

The Lord Keeper.

Palmer *against* Whettenhal. October 13.

On a Demurrer.

The Person not to be subjected in Equity to the Payment of a Rent. See *Max. Eq.* 25. *Ant.* 79, 80, 144.

THE Bill was, That the Plaintiff's Brother was seised in Fee of a Rent of 7 l. per Annum, and had the same paid him by the Owner of the Lands out of which this Rent issued during his Life, and that by his Death this Rent descended on the Plaintiff as Heir, and that the Owners of the Land did pay the Rent to the Plaintiff till 1641. and there had been several Conveyances made of the Land in the late Troubles, and so no Rent paid since 1641. and that the Lands were now come to the Defendant, and so the Bill prayed that he might be decreed to pay the Rent and Arrears.

The Defendant said he did not know any such Rent was issuing out of the said Lands, and that he and those under whom he claims, had enjoyed those Lands thirty several Years under diverse Purchases, without any Demand of the Rent that he knew of, till the Bill, and demurred.

For that the Bill ſought to ſubject his Perſon (which was not to be liable at Law) to pay the Rent and Arrears, and for that it having been ſo long unpaid, it was to be preſumed the Rent was extinguiſhed. And however, it appearing by the Bill, that the Plaintiff had Seiſin, he might bring his Aſſize at Law; and if that had not been a Seiſin, it was ſaid that all the Relief this Court would have given, would be but to give Seiſin. And on Debate the Demurrer was allowed.

No Relief in Equity for a Rent of which the Plaintiff hath Seiſin.
See *Max. Eq.* 25.
Ant. 79, 144.
Moor 805. *Pl.* 1092.
Latch 146.
4 *Leon.* 184.
Ant. 79, 147.

The Lord Keeper.
The Maſter of the Rolls.
Juſtice Rainsford.
Juſtice Windham.

Hide *againſt* Petit. October 25.

THE Parties in Court ſigned an Order by Conſent to refer their Matters to Arbitrators finally to determine, and their Award to be final, and ſtand ratified by Decree without any Appeal. One of the Parties, after that he had attended the Reference, and found they inclined to order him to pay the other Party a Sum of Money, countermands the Submiſſion.

A Submiſſion to an Award by Conſent of Parties by Order of this Court is revokable.
Vide prox. pag.
Of Submiſſions to Awards, ſee 1 *Vern.* 157, 259.
2 *Vern.* 100, 109, 514, 515, and *ibid.* 444.

And the firſt Queſtion was, Whether this Submiſſion was revokable?

Of which the Lord Keeper at firſt ſeemed to doubt; but on Argument and producing a Precedent in Point, Norton againſt Rowland, 8 July 1664. and 10th of the ſame July, the Judges were both of Opinion, that there could be no Submiſſion to an Award in Law or Equity, but what was revokable, and that nothing under a Legiſlative Power can make ſuch a Submiſſion irrevokable, which in its Nature is revokable. But it was an Abuſe to the Court, as it was conceived, to revoke it, for which the Court might juſtly lay the Party by the Heels. And ſo in this Cauſe an Attachment was awarded againſt him niſi cauſa. In this Caſe it was obſerved, that whereas formerly the Courſe was upon Submiſſion to award an Attachment againſt the Party failing, yet of late the Courts of Law do refuſe to grant Attachments in ſuch Caſes,

Attachment againſt a Party revoking a Submiſſion to an Award by Order by Conſent.
See 2 *Vern.* 444.

but leaves the Party to his Action, the Rule being Evidence of his Submiſſion.

Equity will not decree an Award, unleſs it be of all Matters referred. 2 *Vern.* 109. See the Caſe *infra*, and *ant.* 87.

In the principal Caſe the Arbitrators had determined ſome Matters, and had left others undetermined, and ſubmitted thoſe other Matters to the Court: And whether this was therefore ſuch an Award (being but Part of the Matters referred) as was fit for the Court to decree, was the Queſtion. And tho' at Law an Award may be good, tho' but for Part of the Matters referred, unleſs the Submiſſion be conditional to make an Award on the Premiſſes; yet Equity, as it was inſiſted, ought not to decree ſuch an Award, unleſs it be of all Matters referred. And ſo were both the Judges of that Opinion; for it is not a Determination purſuant to the Reference, and ſo the Award was ſet aſide.

Yet a defective Award may be made good in Equity. 1 *Chanc. Rep.* 86.

Note; Equity will rarely ſet aſide an Award, except for manifeſt Partiality, Corruption or Injuſtice in the Arbitrators. 1 *Vern.* 157. 2 *Vern.* 251, 485, 514, *&c.* or except there be apparent Error in the Body of the Award, 1 *Vern.* 158, *&c.* as where it appears to be made on a plain Miſtake of Law or Fact. 2 *Vern.* 705. *Ant.* 86, 87.

The Lord Keeper.
Juſtice Windham.

Squib *and* Bradſhaw *againſt* Bolton. Oct. 25.

Whether Exceptions are to be admitted to an Award on a Reference by Conſent. See the Caſe and Notes *ſupra.*

THE Queſtion was, If upon a Submiſſion by Order of Court by Conſent to Arbitrators, and the Award to be final and ſtand decreed, any Exceptions lie to ſuch an Award as to a Report. And whether, if it were an unjuſt Award, the Court ought to decree it; and whether the Court ſhould examine the Juſtice of the Award, and the Merits of it; which the Maſter of the Rolls had taken upon him to do in this Cauſe, by ordering the Arbitrators to certify the Court whether they had conſidered of certain Particulars, which the Party diſliking the Award, ſaid they had not, which were in Iſſue in the Cauſe. And upon an Appeal from the Maſter of the Roll's Order, it was now ordered that the Parties ſhould attend the Maſter of the Rolls, and ſatisfy him in what he doubted. So here the Court examined the Juſtice of the Award, which in this Cauſe, and the next precedent, the Court did think upon Circumſtances might be done; and that if an unjuſt Award was deſired to be confirmed by Decree, and the Court informed of it, the Court ought not to decree it.

Note; An Award made in Purſuance of an Order of Court, muſt be confirmed as in caſe of a Maſter's Report, and there either Side have Liberty to except, *&c.* and when 'tis confirmed, the Cauſe is to be ſet down for Hearing upon the Award. 1 *Vern.* 470.

The Lord Keeper.

Buſh *againſt* Riſhley. October 31.

THE Bill was to have a Rate Tithe ſettled by Decree againſt the Impropriator, and prevent Multiplicity of Suits.

And for the Plaintiffs it was prayed, that the Court would either decree that the Plaintiffs ſhould hold their Lands under that Modus decimandi, which at a Trial at Law pending this Suit was found by Verdict, or that the Court would direct another Trial to try the Verity of the Modus, and reſerve the Cauſe 'till after the ſecond Trial (if the Court were not ſatisfied with one Verdict) it being inſiſted, that after ſuch Tithe Rate had been aſcertained by two Verdicts, the Court ought to decree an Enjoyment of the Lands, for which the Modus was payable under that Rate Tithe, and diſcharge the Tithe in kind; and it was compared to the Caſe of Copyholders, that have their Fines and Services aſcertained by the Aid of this Court, by directing of Trials for that Purpoſe firſt, and after decreeing according to the Verdicts on ſuch Trials.

But for the Defendant it was inſiſted, that this Court had not at any Time decreed a Modus decimandi, and that Tithes were payable in kind by Common Right.

And though it was inſiſted for the Plaintiffs that it was frequent in the Exchequer to decree a Rate Tithe, the Lord Keeper did not think fit to decree in ſuch a Caſe, but ordered two Depoſitions to be made uſe of at Law, as Occaſion ſerved. And diſmiſs'd the Bill.

A Rate Tithe is not to be decreed in Chancery.
Vide poſt. 282.
2 *Vern.* 46.
1 *Vern.* 60, 185.
New Ca. in Eq. 117.

The Lord Keeper.
Juſtice Wyld.

Bagg *againſt* Foſter.

On a Demurrer.

An Agreement contained in the Condition of a Bond ſhall not be turned into a collateral Execution by Decree of the Land. *Vide ant.* 85, 86. *poſt.* 239.

William Buſhel on his Marriage with Dorcas his Wife, enters into a Bond of 1000 l. to Truſtees to her Uſe, in Auguſt 1648. conditioned to be void, if he did not within two Months ſettle the Land in Queſtion on thoſe Truſtees, to the Uſe of himſelf and Dorcas, and their Heirs in November next. After William Buſhel covenanted with one of the Truſtees to ſtand ſeized of thoſe Lands to the Uſe of himſelf for Life, Remainder to Dorcas for Life, Remainder to his firſt and tenth Son in Tail, Remainder to his own right Heirs. William Buſhel dies without Iſſue; Dorcas ſurvives many Years, and marries with one Bagg, by whom ſhe hath Iſſue the Plaintiff, her Son and Heir, an Infant. And now in his Behalf the Bill is brought againſt the Defendant, who claims under the Heir of William Buſhel, to inforce a Conveyance according to the Condition of the Bond.

For the Defendant it was demurred unto, for that the Bond was in 1648. and William Buſhel in November after made a Settlement, ut ſupra, to which one of the Truſtees was a Party. And for that there is no Iſſue of the Plaintiff's Mother, and William Buſhel, and the Plaintiff, a meer Stranger to William Buſhel, being the Child of Dorcas by another Husband; and that the Conveyance, ut ſupra, ought reaſonably to be intended for a Performance of the Marriage Agreement; and at leaſt that the Plaintiff ought not to have any Relief in Equity, it not appearing that any Poſſeſſion hath gone according to the Bond, or that any Relief was 'till now ſought, though it be one and twenty Years ſince.

An Agreement being for a perſonal Thing, no Decree to make it real.

On the Argument of the Demurrer it was for the Defendant inſiſted, that there being no Agreement but what was in the Condition of the Bond, and no Articles or Agreement beſides, and the Bond two and twenty Years old, and ſuch Settlement, ut ſupra, made unto one of the

Obligees of the ſame Land mentioned in the Condition, though not to the ſame Uſes, and Dorcas never queſtioning it in her Life, and the Agreement being ſecured by Penalty, which was relied upon, that this Caſe did differ much from an Agreement by Articles to ſettle Lands; for here the Party reſted on a Penalty, and there was no Reaſon to turn ſuch an Agreement as this was, into a collateral Execution by decreeing the Land, which the Court did conceive reaſonable, and ſo allowed the Demurrer.

Vide ant. 85, 86, *poſt.* 239.

The Lord Keeper.

Withers *againſt* Kelſea. November 16.

A Factor gives his Daughter 300 l. Portion charged on Lands, and dies: The Daughter marries and hath a Jointure ſettled on her by her Husband, and hath no other Portion but the 300 l. The Husband dies before any Part of the 300 l. was paid. The Plaintiff is the Executor of the Husband, and ſues the Widow and the Heir of the Lands for the 300 l.

The Queſtion was, who ſhould have the 300 l. whether the Executor of the Husband or the Wife?

For the Executor of the Husband it was inſiſted, That he having ſettled a Jointure in Conſideration of the Portion, which Jointure the Wife enjoyed, that thereby in Equity the Right of the Portion was ſo veſted in him, that the Executor, and not the Wife ought to enjoy it.

The Lord Keeper declared, That this 300 l. being to go out of the Rent of the Lands, and charged upon Lands, was not in the nature of a Thing in Action, but of a Rent, and given to the Husband by the Marriage: And ſo decreed for the Plaintiff the Executor. Sed quære; for a Rent belonging to a Feme both, in caſe ſhe ſurvive the Husband, belong to the Wife, and ſo the Arrears that incur during the Coverture. 1 Inſt. 351.

Where the Portion in Money ſhall go to the Executors of the Husband, and not the Wife ſurviving. *Vide ant.* 21, 27, 41, 58, 81, 182. 1 *Vern.* 18, 161, 170, 396, 408.

Of Conditions annex'd to Legacies, Portions, &c. *vide ant.* 22, 58, &c. *ſupra.* And note; Equity will relieve againſt Breaches of Conditions, where the Court can make a Compenſation. See 1 *Vern.* 83, 167, 223, 270, 271. 2 *Vern.* 222. But it will not relieve againſt the Breach of a Condition in a voluntary Settlement. 1 *Vern.* 456. 2 *Vern.* 561, 721.

The

The Lord Keeper.
Juſtice { Twiſden, Wyld, Rainsford, Windham.

Holt *againſt* Holt. December 7.

The Condition of a Recognizance qualified in Equity, according to the (Intent and) Equity of the Caſe for which 'twas given. See 1 *Vern.* 79, 83. That 'tis ſufficient if the Intent of a Condition be performed, though not the Words. *Vide ant.* 22, 53, 58, 90, *&c.* 126, 152.

ALexander Holt, a Citizen of London, ſeized and poſſeſſed of Houſes in London and elſewhere, of a publick Title, and poſſeſſed of Houſes in St. Martins in the Fields by Leaſe from the Church of Weſtminſter, 18 May, 1656. by his Will in Writing gave 10000 l. to his Daughters, being his only Children, and Orphans, to be paid out of his Eſtate Real and Perſonal at their Age of one and twenty, or Marriages (which firſt ſhall happen) and made Alexander Holt, his Nephew, and others, his Executors, and died. The Executors proved the Will; and the Executor Alexander and others, as his Sureties, in 1658. entred into a Recognizance to the Chamberlain of London, for the Payment of the 10000 l. (which by the Will was firſt to be paid) before any others ſhould have any Benefit of his Lands, &c.

By the Reſtauration of the King the Lands of the publick Title reverted to the right Owners. And by the Fire in London the Houſes of the Teſtator in London were burnt down, ſo that it was to be doubted his whole Eſtate would not amount to the 10000 l.

And the firſt Queſtion was, Whether the Recognizance ſhould in Equity extend any farther than only to make good to the Orphans ſo much as the Teſtator's Eſtate, conſidering the Loſſes aforeſaid, and as it now was really worth?

And it was inſiſted by the Counſel of the Sureties of the Executors, that it ought not to be binding any farther in Equity. For that if the Chamber of London had taken the Eſtate of the Teſtator into their Hands, it would have been in no better plight than now it is. And the Intention of the Security was but that the Executors ſhould not miſimploy or waſte the Eſtate, which (as it was declared) they had not done, but were ready to account for what they had already received.

The Court as to that Point were all of one uniform Opinion, that the Recognizance ſhould be made Uſe of no further than to make good the Value of the Teſtator's Eſtate over and above the Loſſes by Fire, and the King's Return, and decreed the ſame accordingly.

A Condition of a Recognizance for Payment of Money generally, qualified in Equity to the original Equity. 1 *Vern.* 79, 83.

Albeit it was inſiſted for the Orphans, that the Condition of the Recognizance was generally for Payment of the 10000 l. (and ſo it was) And the Executor Alexander had thereupon taken upon himſelf the abſolute Ownerſhip of the Eſtate, and managed it as his own. And that now a Loſs had befallen the Eſtate, the Orphans ought not to be carried back to the Account of the Teſtator's Eſtate, for that by the Recognizance the Orphans Portions were now become Debts. Nevertheleſs for the Reaſons before it was decreed as aforeſaid.

And the next Queſtion was, Whether the Leaſe held of the Church of Weſtminſter, which had been renewed by the Executor, and a Fine paid, and new Houſes built thereupon by the Executors, ſhould be taken to be Part of the Teſtator's Eſtate?

Where a Leaſe renewed by an Executor, ſhall be liable to a Legacy of the Teſtator s.

For the Executors it was inſiſted, They were not Executors in Truſt for the Orphans, but were to pay them out of the Eſtate 10000 l. only; and the Eſtate was looked upon at the Teſtator's making his Will, and really was then, and before the ſaid Loſſes, of much greater Value, and a Benefit was intended the Executor Alexander by the Teſtator. But the Court did unanimouſly agree, That the Daughters ſhould have the Benefit of the renewed Leaſe, paying the Fine and other Charges of Improving. And ſo it was decreed accordingly. But this muſt be underſtood ſo far only as to the Compleating the Orphans 10000 l.

If a Truſtee of a Term ſurrender, and take a further Term, that ſhall be for the Benefit of *Ceſtuy que Truſt. Vide ant.* 49. 1 *Vern.* 60. *Poſt.* 298.

But it was agreed by the whole Court, that in caſe of an Executorſhip in Truſt, the Renewal of ſuch a Leaſe ſhall go to the Benefit of Ceſtuy que Truſt.

DE

DE
Term. Sanct. Hill.
Anno Regis 22 & 23 Car. II.
IN
CANCELLARIA.

Judge Moreton.

Verhorn *againſt* Brewine *and others.* Jan. 18.

A Nuncupative Will is not pleadable in any Court before Probate.
1 *Chanc. Rep.* 268.
2 *Chanc. Rep.* 78.
See 1 *Vern.* 200, 256, 397.
2 *Vern.* 8, 49, 76, 634.

THE Plaintiff ſued as Adminiſtrator to have a Diſcovery and an Account of the Eſtate of his Inteſtate.

The Defendant pleaded that the ſuppoſed Inteſtate made a Nuncupative Will, and another Perſon, whom he named in his Plea, his Executor; and inſiſted he was not anſwerable or accountable to the Plaintiff, nor to any other but the Executor.

On Debate it was ruled, that before Probate of the nuncupative Will (which is only to be proved in the Eccleſiaſtical Court) it is not pleadable in any Court againſt an Adminiſtrator; and ſo the Plea was over-ruled.

Where parol Proof may be to explain a Will, or not, *vide* 2 *Vern.* 21, 98, 99, 252, 337, 339, 506, 517, 593, 624, 648, 736.

William Barber *againſt* William Took *and* Charles Lindſey. January 25.

MAtthew Lindſey was ſeiſed in Fee of the Lands in Queſtion, and by Will in Writing deviſeth them to the Plaintiff in Fee, and after mortgageth thoſe Lands to the Defendant Took for Years, and dies, the Defendant Charles Lindſey being his Couſin and Heir.

And the Queſtion was, Who ſhould have the Redemption, the Plaintiff Barber or the Heir?

For the Plaintiff it was inſiſted, That the Deviſe to him, being of the Fee, and the Mortgage after being but a Term for Years, that was a Revocation but pro tanto, and not pro toto, and the Deviſe did notwithſtanding paſs the Reverſion, and conſequently the Equity of Redemption.

And of that Opinion was the Judge. But the Defendant, the Heir's Counſel, inſiſted, that there was an actual Revocation of the whole Will. It was directed to be tried whether there was an actual and total Revocation.

A Conveyance for Years is not a Revocation of a Deviſe in Fee, but *pro tanto* only.
Vide 1 *Vern.* 23, 30, 97, 141, 182, 329. 2 *Vern.* 209, 241, 495, 496, 680, 720, 742, 498, 598, 625, 722.

The Lord Keeper.

The Poor of the Pariſh of St. Dunſtan, *by Engliſh Bill, againſt* Beauchamp. Feb. 6.

A Decree having been made by Commiſſioners upon the Statute of Charitable Uſes, thoſe for whom the Decree was made brought an Original Bill, ſetting forth that the Defendant to the Decree threatned, when the Witneſſes were dead, they would except to the Decree, and ſo prayed that the Defendant might ſhew Cauſe, why the Decree ſhould not be confirmed. The Defendant by Anſwer ſubmitting to the Decree, it was decreed by the Lord Keeper, That the Decree of the Commiſſioners ſhould be confirmed.

A Decree by Commiſſioners for charitable Uſes, confirmed by original Bill.
Poſt. 195, 267.
Ant. 135.

Quod nota, and Quære, What need of ſuch a Bill; for that when a Decree is made by Commiſſioners, the Courſe is to return it into the Petty-Bag, and then to ſerve the Defendant with a Writ of Execution, upon

The Courſe of Proceedings in Petty-Bag on Decrees of charitable Uſes.

which Service the Defendant may file Exceptions, and pray to stay Proceedings till they be heard. But if the Defendants do not then except, but submit to the Decree, it seems reasonable they should be concluded thereby, and not be admitted to Exceptions after.

The Master of the Rolls.

Dakins *and his Wife against* Berisford. Febr. 6.

A Trust for the Benefit of the Wife without negative Words, doth not exclude the Husband.

Vide 1 *Vern.* 7, 18, 88, 161, 170, 233, 261, *&c.*

2 *Vern.* 17, 64, 68, 120, 270.

LEases were devised to the Defendant by his eldest Brother, to be sold for several Purposes, and amongst others, in Trust that the Defendant should purchase in his own Name an Annuity of 80 l. per Ann. for the Life of the Plaintiff's Wife, and pay the same to her and her Assigns. The Bill was to inforce the Payment of his Annuity.

The Defendant insisted by Answer, that he had constantly paid the Annuity to the Plaintiff's Wife (from whom the Plaintiff lived apart) and that the Bill was against her Consent, and that it was the Intent of the Donor to be for her only Benefit, the Will being, that he should buy in his own Name the Annuity in Trust for the Plaintiff's Wife (who is the Defendant's Mother) and her Assigns; and so insisted, that the Plaintiff not inhabiting with her, he ought not to be put to pay the Annuity to him. It appeared by Proofs that the Cause of the Plaintiff's first absenting himself from his Wife was for Fear of Debts, and that he had since solicited her by Letters to co-habit; but she refused.

The Master of the Rolls declared, That in this Case the Husband was the Assignee of the Wife, and that there being no negative Words by the Will to exclude the Husband from the Annuity, he could not exclude him; and so decreed the Defendant to pay all the Arrears of the Annuity since the Bill exhibited, and the growing Annuity for the Future, to the Plaintiff the Husband.

The Lord Keeper.
Juſtice Twiſden.
Juſtice Moreton.

Smith *and others againſt* Stowel *and others.*
February 17.

An Appointment to a Charity that was precedent to the Statute of 43 *Eliz.* and ſo void, is made good by the Statute. *Ant.* 193.

THERE was a Diſpoſition in 1579. (which was before the Statute of 43 Eliz. for Charitable Uſes) to a Charity; part of the Lands were of a defective Title, and the whole Diſpoſition void, being before the Statute. Yet an Agreement was made between the Parties intereſted and the Truſtee, for the ſettling the Uſe deſigned, ſo much as was proportionable in Value to what the Donor had to give; and this was ſettled accordingly before the Statute, and long Leaſes were let of the Ground to divers Tenants, at ſmall Rents, to build, who had thereby improved that Ground that was but 20l. per Ann. to 150l. per Ann.

A Decree was made by the Commiſſioners for avoiding the Tenants Leaſes, they not being in Strictneſs of Law good.

Upon Exceptions to that Decree, it was declared by the Court, that though the Charity was precedent to the Statute, yet the Statute ſubſequent had a Retroſpect, and would make it a good Appointment, that was not ſo before (but void). And it was declared, that ſo as the Ter-tenants be no Loſers they ought not to be Gainers in the Caſe of Charity: And ſo ordered, that during the Ter-tenants Leaſes there ſhould be an Augmentation of 50l. per Ann. allowed by them in Proportion to the Poor.

Ter-tenants Leſſees of a Charity ordered to augment their Rent.

The Lord Keeper.
Juſtice { Twiſden, Wyld, Rainsford, Windham.

Henry North *Eſq*; *againſt* Charles Crompton *Eſq*; March 25.

A Deviſe of all one's Eſtate, Real and Perſonal, is a Deviſe in Fee.
New Ca. in Eq. 92.
poſt. 262.
2 *Chan. R.* 147, 190.
1 *Chan. R.* 190, 203.

KAtharine Crompton, Spinſter, ſeized in Fee of the Lands in Queſtion, by her Will in Writing the 21ſt of January 1669. expreſſeth thus: I ordain and conſtitute *Henry North*, Eſq; (which is the Plaintiff) to be mine Executor of this my laſt Will. And I do give all my Eſtate, real and perſonal, to diſpoſe of for the Payment of all my juſt Debts; and for the performing of all ſuch Legacies as I have herein, or by the Codicil annexed, bequeathed unto my Executor abovenamed; and gives ſeveral Legacies in Money, and amongſt others 200 l. to the Defendant her Uncle, who is Heir at Law; and a Legacy of 500 l. being omitted to the Plaintiff's Siſter, it was inſerted in a Codicil.

Mr. North's Bill was to prove this Will per Teſtes.

Mr. Crompton's Bill was to be relieved upon the Truſt of the Deviſe as he ſuppoſed after the Debts and Legacies paid, and to diſcover what the Debts were.

Theſe Cauſes came firſt to be heard 8 Febr. 1670. before the Lord Keeper and Baron Wyndham, and then theſe two Queſtions were ſtirred by the Court.

1. Whether this were a Deviſe of Lands in Fee?

2. Whether Mr. North (the Plaintiff Crompton claiming by an implied Truſt) after Debts and Legacies paid, might not be admitted to aver againſt that Implication?

Of both theſe Points the Court took Time to conſider.

3. March, 1670. The Cauſe being heard again before the Lord Keeper and Mr. Baron Wyndham, they declared they were both of Opinion, That it was a Deviſe

of the Lands in Fee, and then they doubted whether a Truſt be created for the Heir of the Surplus. And another Queſtion they made, If a Truſt, whether an Averment did not lie for Mr. North, it being but an implied Truſt, and not within the Statute of H. 8. Of Wills.

And 25 March, 1671. the Lord Keeper and the four Judges all agreed, That a Fee paſſeth by the Deviſe. And as to the implied Truſt, all conceived there was not any implied Truſt for the Heir for the Surplus; for if there were, the Deviſee had no Benefit; and to no Purpoſe was the Deviſe of the 200l. to the Heir, if ſhe had intended the Surplus to the Heir.

No implied Truſt of the Surplus for the Heir; *poſt.* 208.

DE

DE
Termino Paſchæ,
Anno Regis 23 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Thomas Martin, *Clerk*, *againſt* Douch *and* Overton.

A Sum of Money given to one to diſpoſe as the Teſtator ſhall appoint by a Note, who dies without ſuch Appointment, a good Bequeſt to the Party.
1 *Vern.* 255, 462.

ONE Foſter deviſeth to the Plaintiff in theſe Words, *Item*, I give to my Couſin *Thomas Martin*, Clerk, late Miniſter of *Houghton* in *Northamptonſhire*, and living thereabouts, I do order 40 *l.* to be paid him to be diſpoſed of for certain Uſes, which I ſhall in a private Note acquaint him with, and gave him no Note or Direction how to diſpoſe of it, but died, the Defendants being his Executors. And whether the Plaintiff ſhould have the 40 l. was the Queſtion.

The Maſter of the Rolls was of Opinion the Plaintiff ſhould have the 40 l. for that the Teſtator did non intend it ſhould come to his Executors, but had by his Will given it away from them; and ſo he decreed the Defendant to pay the 40 l. to the Plaintiff.

The Lord Keeper.

Pate *against* Hatton *or* Hutton. May 15.

A Citizen and Freeman of London deviseth to his Son a gross Sum, which did exceed the customary Part, and deviseth that if his Son die before he attain One and twenty, that Sum over to another.

The Question was, If the Devise over was good?

And it was adjudged, and so decreed by the Lord Keeper, That the Devise over for so much as was the customary Part, was void; and that the Orphan dying within Age, his Administrator was intitled to so much as was the customary Part, and the Surplus of that gross Sum to go to those to whom it was devised over.

Vide ant. 181, 182. *Post.* 285, 310.

A Citizen in *London* cannot devise his Child's Part over to another, in case the Child die in Minority.

See the Case of *Newland* and *Sheppard*, *Mich.* 10 *Geo.* 1. in *Chan. New Cases* 2. *Part* 57.

The Lord Keeper.

Lambert *against* Bainton. May 15.

MR. Dunch in 1646. had conveyed the Lands in Question to Sir Edward Bainton in Fee, in Trust to sell all, or any Part of it for Payment of his Debts. Sir Edward Bainton had conveyed his Lands to his Son, and was dead. Dunch being dead, and the Plaintiff being intitled to the Benefit of the Trust after the Debts paid, brought the Bill to avoid the Conveyance made by Sir Edward Bainton to his Son, and so have a Reconveyance.

For the Defendant it was insisted, That tho' it was a Trust in Sir Edward, yet Sir Edward had paid the Debts to the Value of the Estate, and was thereby become a Purchaser as much as if he had sold the Lands to another.

The Lord Keeper declared, That if Sir Edward Bainton had paid to the Value of the Lands, he was a Purchaser; but it not appearing what he had paid, when he made

Where a Trustee for Sale of Lands for Payment of Debts pays to the Value of the Lands, thereby he becomes a Purchaser himself.

made the Settlement, more than he received, referred it to a Maſter to examine, and declared, that the Defendant, as to ſo much as Sir Edward had then diſburſed, ſhould be taken as Purchaſer, becauſe Sir Edward might ſell all or any Part; and ſo the Defendant is a Purchaſer pro tanto.

The Lord Keeper.

William Vanbrough *againſt* William Cock *and his Wife, and* Peter Drybutter. May 17.

A Sentence in the Spiritual Court ſubject to an Examination in Equity. 1 *Vern.* 54, 58, 131. Of the Juriſdiction of Chancery, *vide ant.* 123, 124, 173, *&c. ibid.*

About ſeventeen Years ſince, Cornelius Beard bequeathes to his Siſter, then in her Infancy, 250l. to be paid at Marriage, or one and twenty Years, and made one Andrew Drybutter and the Plaintiff Executors, and died, leaving his Siſter young. Both the Executors made Probate of the Will, but the Plaintiff at the Deſire of the Siſter's Friends did forbear to meddle with the Teſtator's Eſtate, and left it wholly to Andrew Drybutter, the other Executor, who only did act in it. Andrew dying he made Elizabeth, his Wife, his Executrix. She poſſeſſed what there was of the firſt Teſtator's Eſtate, and paid to the Defendant Cock's Wife, then the Wife of one Earl, 100l. Part of the 250l. and the ſaid Elizabeth Drybutter kept all the firſt Teſtator's Books and Papers, and that by the Deſire of the ſaid Legatee, and ſhe dying ſhe made the Defendant Peter Drybutter her Executor. The Defendant, Cock's Wife, libelled in the Spiritual Court againſt the Plaintiff for her 250l. and hath Sentence there againſt him for the Whole, hanging this Suit; and yet hath by Anſwer confeſt 100l. Part of the 250l. to be paid.

The Scope of the Bill was to be relieved againſt the Spiritual Court, ſetting forth that by that Law the Plaintiff having joined in the Probate would be charged with the Legacy, though he did not meddle with the Eſtate; and that it was againſt Equity to charge one Executor with the Receipts of another. And the Bill charged that the other Defendant Drybutter had Aſſets both of Andrew Drybutter and Elizabeth Drybutter's Eſtate; and if they had not paid as far as they had Aſſets of Beard's Eſtate,

the Defendant Drybutter, and not the Plaintiff, ought to pay what was unpaid of the 250 l. Legacy.

The Defendant Drybutter confeſſed he had Aſſets of the ſaid Andrew and Elizabeth, his Father and Mother's reſpective Eſtates, and inſiſted that they had fully adminiſtred Beard's Eſtate; and the Queſtion was what Relief they ought to give the Plaintiff againſt the Sentence in the Spiritual Court.

Whether a Sentence in a Spiritual Court be ſubject to Examination in Equity.

The Lord Keeper declared, that the Judgments of the Eccleſiaſtical Court were as ſubject to the Equity of this Court, as Judgments in the Common Law Courts; and howbeit at Law one Executor is not liable to the Devaſtavit of another, yet in the Eccleſiaſtical Courts, and by their Law, if an Executor prove the Will, they will charge him, tho' he do no further intermeddle to pay the Legacies: But Quære if that be not only where there is a Failer of bringing an Inventory. Doctor & Stud. 67. And the Lord Keeper declared the Plaintiff is without Relief by Appeal from the Sentence, becauſe the Judges Delegate muſt judge according to that Law, and ſo inclined to relieve the Plaintiff, but took Time to adviſe.

Preſumption.

Doctor & Student ut ſupra, A Law grounded on a Preſumption, if the Preſumption be untrue is not to be holden in Conſcience; for Stabitur Præſumptio donec probetur in contrarium.

Sir Ralph Bovey *againſt* Skipwith. May 25.

Mortgage.
Ant. 166, 167, 201, 202, 218, *&c. ibid.*
2 *Vent.* 337, 338.
Hardreſs 173.
2 *Chanc. Caſes* 208, 20, 35, 213.
1 *Chanc. Caſes* 36, 162, 163.

IN 1651. Sir Francis Drake made the Plaintiff a Security out of the Manor and Rectory of Waltham upon Thames. Afterwards in 1656. Drake made the Defendant a Security for Money out of the Rectory only (the Defendant having no Notice then of the Plaintiff's Security which was for Money alſo.) Afterwards the Defendant hearing of the Plaintiff's Security, buys in a Security precedent to the Plaintiff's, which one Beddingfield had both upon the Manor and Rectory.

1. Queſtion was, Whether the Plaintiff ſhould be admitted to redeem Beddingfield's Security without paying off what was due to Skipwith? And it was ruled he ſhould not. Vide Marſh and Lee's Caſe.

Where a Mortgagee buying in a precedent Security of the Lands in his Mortgage and other Lands, ſhall hold all againſt a middle Mortgagee of all thoſe Lands, till all due to him on both Securities be ſatisfied.

2. Queſtion was, Whether inaſmuch as the Defendant's Security was only out of the Rectory, and the Security he bought in from Beddingfield was of both the Manor and Rectory, the Defendant ſhould make Uſe of Beddingfield's Security as to the Manor after that by the Profits of the Manor and Rectory Beddingfield's Debt was ſatisfied? And whether then the Plaintiff ſhould not then be admitted to enjoy the Manor, his Security being as well of the Manor as the Rectory, and the Defendant to hold only the Rectory till he was ſatisfied.

Wyld and Twiſden were of Opinion, That after Skipwith had received what was due on Beddingfield's Security, he ſhould receive no more Profits of the Manor, but the Plaintiff to be let in to receive them, and the Defendant only to make uſe of Beddingfield's Security, as to the Rectory, to protect his Security of the Rectory. But it was reſolved and ruled, that the Defendant ſhould hold both the Manor and Rectory againſt the Plaintiff, till all due to him on both Securities was paid him. Quære tamen.

The Lord Keeper.

Rich *againſt* Sydenham. May 26.

THE Plaintiff upon the Loan of 90 l. had gotten a Bond from the Defendant of 1600 l. for Payment of 800 l. and Judgment thereupon. The Defendant in the Right of his Wife was intitled to certain Lands that were eſtated in other Perſons in Law in Truſt for her.

Where the Contract is intire, and inequitable, Equity will not apportion Relief for Part. See *Max. of Equity* p. 4 and 6.

The Bill was to have thoſe Lands ſubjected to the Plaintiff's Satisfaction here, inaſmuch as the Defendant was intitled to the Truſt in the Right of his Wife.

But the Security being gotten from the Defendant when he was drunk, the Lord Keeper would not give the Plaintiff any Relief in Equity, not ſo much as for the Principal he had really lent; and ſo the Bill was diſmiſt.

For he who has committed Iniquity, ſhall not have Equity. *Vide ant.* 154. 2 *Chanc. cap.* 15. *poſt.* 276, 293. *Maxims of Equity*, p. 4, 6, &c.

The Lord Keeper.

The Mayor and Aldermen of London, *and* Byfield *an Infant, againſt* Slaughter, *the Executors of the Plaintiffs Father.* May 27.

THE Bill was to bring in one that lived out of the Juriſdiction of London, to come and give Security to the City for the Orphan's Portion, according to the Cuſtom of the City.

The Defendant by his Anſwer offers to do as this Court ſhould direct, but being no Freeman, would not be ſubject to the City Orders.

1 *Roll. Abridgment* 373. *M. Pl.* 3. The Chancery Aſſiſtant to the Juriſdiction of the Mayor's Court. See *Max. Eq.* 26. 2 *Ventr.* 345.

The Recorder. This Court uſeth to aſſiſt the City in ſuch like Caſes, and on Petition uſeth to grant Subpœna's to Perſons to appear before the Mayor in his Court, and cited a Precedent 28 Febr. 3 Jac. Fiſh and Cole's Caſe, of a Subpœna out of the Subpœna Office.

Maynard for the Defendant. This Cuſtom concerns the Country as well as the City, and muſt be tried by Verdict; and it is inconvenient for Country Gentlemen to be put to give Security to the Orphans Court by Recognizance.

The Lord Keeper decreed the Plaintiffs to try the Cuſtom.

But though the Chancery will aſſiſt the Juriſdiction of inferior Courts in the doing of what is Juſt and Right; yet if there will likely be a Failure of Juſtice, Equity will prohibit their Proceedings, and reſtrain their Juriſdiction, as in 1 *Roll. Abr.* 374. *Pl.* 4. 12 *Co.* 113. *Max. Eq.* 25, 26.

DE
Term. Sanct. Trin.
Anno Regis 23 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Doctor Salmon *againſt the* Hamborough *Company, by the Name of the Governor, Aſſiſtants and Fellowſhip of Merchant Adventurers of* England, *and divers particular Members of that Company by Name, in their natural Capacities.*

A Courſe to recover a Debt from a Corporation that hath nothing whereby it may be ſummoned.

THE Bill charged, that the Company were incorporated prout per Letters Patent, and had Power to make By-Laws, and to aſſeſs Rates upon Cloaths (which was the Commodity they dealt in) and by Poll upon every Member to defray the neceſſary Charge of the Company, and that the Company had impoſed Rates accordingly, as namely, 4 s. 6 d. upon every white Cloath exported, and divers others, and thereby raiſed 8000 l. per Ann. towards the Support of the Common Charge of the Company, and that they had thereby got great Credit, and borrowed great Sums of Money by their Common Seal, and particularly the Plaintiff lent 2000 l. upon that Security many Years ſince. And the Bill did ſet forth divers Advantages they had

in Trade by being Members of this Corporation, which others wanted. And the Bill did charge, That the Company having no Common Stock, the Plaintiff had no Remedy at Law for his Debt, but did charge that their Usage had been to make Taxes, and levy Actions upon the Members and their Goods, to bear the Charge of their Company to pay their Debts, and did complain that they now did refuse to execute that Power, and did particularly complain against divers of the Members by Name, that they did refuse to meet and lay Taxes, and that they did pretend want of Power by their Charter to lay such Taxes, whereas they had formerly exercised Power, and thereby gained Credit; whereupon the Plaintiff lent them 2000l. which was for the Use and Support of the Company's Charge, and so ought to be made good by them, and so prayed to be relieved.

Paschæ, 1656. this Bill was filed, and the Company served with Process, but would not appear, they having nothing by which they may be distrained: But divers particular Members being served in their natural Capacities, did appear and demur, for that they were not in that Capacity liable to the Plaintiff's Demands. 10 May 1666. On the Argument the Demurrer was allowed, and the Bill dismist as to them, and that Dismission enrolled, and thereupon a Petition of Appeal was preferred to the Lords in Parliament, admitting that in the ordinary Course of Proceedings in Chancery that Court could not help the Plaintiff. But in Causes of this Nature the Lords House had given special directions to the Chancery to relieve, and it had been accordingly so done, and produced two Precedents against Companies in London for that Purpose. And to this Petition the Defendants particularly named did put in an Answer, Plea and Demurrer, and the Company, tho' several times summoned, did not appear. And upon Debate of the Matters before the Lords at the Bar of the Lords House 20 January, 1670. this Order was made.

Where the Chancery (according to rule) cannot relieve in a just Cause, the Parliament will give special Directions for Relief. *Vide ant.* 56, 158. *post.* 228.

The matter upon the Petition of Salmon, Dr. of Physick, exhibited to the Lords Spiritual and Temporal in Parliament assembled, against the Governors, Assistants and Fellowship of the Merchant Adventurers of England, commonly called the Hamburgh Company, and Sir Charles Lloyd Baronet, Sir Anthony Bateman Knight, Thomas Smith, Richard Wyan, John Dogget, Henry Colliar, Henry Smith,

Smith, John Lethieulier, Chriſtopher Pack, George Wytham, and others, Members of the ſaid Company, and upon the Anſwer, Plea and Demurrer of the ſaid Rowland Wyan, John Dogget, Henry Collier and John Lethieulier put in to the ſaid Petition (the Governor, Aſſiſtants and Fellowſhips, tho' ſeveral times ſummoned, not appearing) being heard at the Bar of this Houſe, in Preſence of Counſel learned on both ſides, the ſaid Petition being on Appeal made from a Diſmiſſion in the High Court of Chancery, and the Petitioners Bill there. Their Lordſhips on reading the ſaid Petition, the Anſwer, Plea and Demurrer thereto, and the ſaid Diſmiſſion, and the Charter by which the ſaid Governor and Fellowſhip are incorporated, and hearing what was alledged on both ſides, do order that the Diſmiſſion, for ſo much as concerns the ſaid Company, be, and do ſtand reverſed, and that the Lord Chancellor, or the Lord Keeper of the Great Seal of England for the Time being, do retain the ſaid Bill. And that the ſaid Court of Chancery ſhall iſſue forth the uſual Proceſs of that Court, and if Cauſe be, Proceſs of Diſtringas thereupon againſt the ſaid Corporation; provided the ſaid Proceſs be ſerved one Month before the Return thereof. And if upon Return of the Proceſs, the ſaid Corporation ſhall not file an Appearance, or ſhall appear and not anſwer, the ſaid Bill ſhall be taken pro confeſſo, and a Decree ſhall thereupon paſs. But in caſe the ſaid Corporation ſhall appear and anſwer within the Time aforeſaid, then the Court of Chancery ſhall proceed to examine what the Plaintiff's juſt Debt is, and ſhall decree the ſaid Company to pay ſo much Money as the ſame ſhall appear to amount unto, with reaſonable Damages. And in caſe the Corporation ſhall not pay the Sum decreed within ninety Days after the Service of the ſaid Decree upon their Governor, Deputy-Governor, Treaſurer, Clerk or Secretary for the Time being; then the Lords Spiritual and Temporal do farther order, adjudge and direct, that the Lord Chancellor or Lord Keeper for the Time being ſhall order and decree, that the Governor or Deputy-Governor and the twenty-four Aſſiſtants of the ſaid Company, or ſo many of them as by the Tenor of their Charter do conſtitute a Quorum for the making of Leviations upon the Trade, or Members of the ſaid Company, for the Uſe of the ſaid Company, ſhall within ſuch Time as by the Lord Chancellor or Keeper ſhall be thought fit, make ſuch a

Leviation upon every Member of the said Company as is to be contributary to the Publick Charge, as shall be sufficient to satisfy the said Sum to be decreed to the Plaintiff in that Cause, and to collect and levy the same, and to pay it over to the Plaintiff as the Court shall direct. And such a Leviation is to be put in Writing, and signed with the Hand of the Governor, Deputy-Governor and Assistants of the aforesaid Company for the Time being, and so many of them, as by the Constitution of the said Charter do make a Quorum, shall not make or return such Leviations, as aforesaid, the Lord Chancellor or Lord Keeper may issue Process of Contempt against them, as is usual against Persons in their natural Capacities. And if by the said Time so to be limited by the said Court of Chancery, the said Money so to be assessed, shall not be paid, then and from thenceforth every Person of the said Company, upon such a Leviation, shall be made to be liable in his Capacity to pay his quota or Proportion assessed. And the Lord Chancellor or Lord Keeper is to order or decree, that such Process shall issue against any such Member so refusing or delaying to pay his quota or Proportion, as is usual against Persons charged by the Decree of the said Court, for any Duty in their several Capacities. And if the Total so returned and filed with the Register shall not amount to so much as shall be sufficient to satisfy the Sum decreed, with Respect had to such Person as shall make it appear that they are overcharged, or ought not to be charged at all, then the said Lord Chancellor or Lord Keeper for the Time being, may from Time to Time, order that a new Leviation be made and returned into the Registers of the Court of Chancery, of such Sum as shall be sufficient, by way of Supplement for that Purpose, to the Payment whereof every individual Person is to be bound in such Manner as aforesaid.

6 March 1670. The Lord Keeper on a Motion grounded on the Lords, ordered that the Dismission stand reversed, and the Bill stand revived, and that Process and other Proceedings issue as is thereby directed, and the Service thereby directed be sufficient.

Accordingly the Treasurer and Secretary were served with a Distringas against the Company, and Copies of the Lords Order. The Sheriff returned Nulla bona; and no Appearance is made.

5 July

5 July 1671. Ordered the Cause be put into the Paper to be heard, and Notice to be given to the Treasurer, Clerks and Secretary.

Decree. *Pro confesso.* 2 *Chanc. Rep.* 284. 1 *Vern.* 247. 3 *Chanc. Rep.* 22.

And now the 5th of July 1671. none appearing for the Defendants, the Court decreed the Bill to be taken pro confesso, and the Defendants to pay the Plaintiff's Debt, according to the Lord's Order in Parliament.

The Lord Keeper.
Justice Wyld.
Baron Windham.

The Lord Cornbury *and Dame* Flora *his Wife, formerly the Lady* Backhouse, *against* Simon Middleton, *and others.* July 1671.

THIS Cause begins fol. 173. and being abated by the Plaintiff's Inter-marriage since the last hearing, a Bill of Revivor was brought, and the Cause was reheard by the Lord Keeper, assisted with Justice Wyld and Baron Windham the 3d of March 1670. And the Case appearing to be as before, it was for the Defendants insisted, that the Contract made by Sir Hugh Middleton, with Bishop, did not bind; and that he being but Cestui que trust of a Surplus, had no Power to sell, for that it was against the very Essence of the Trust for him to have a Power to dispose; and it would be a vain Thing for any Parent to settle his Estate by way of Trust, to prevent his Sons imprudent Disposition of it, (which Sir William Middleton did here so settle his Estate with a Design to keep a hand on his Son,) if notwithstanding his Son might have Power to sell it when he pleased.

Cestui que trust of a Surplus hath but a bare Possibility, and cannot sell. *Vide ant.* 8, 9, 173, 175, 197.

The Breach of an Agreement is not devisable.

And it was farther insisted on for the Defendant, that if the Agreement with Bishop were binding, yet the Plaintiffs have no Title to have the Benefit of that Agreement, for that the Breach of an Agreement, as the Case was, was not devisable, and so the Plaintiff had no Title; Things in Action, as this Case is, being not devisable.

Equity consists purely in Action, and is only attainable by Process in a Court of Equity.

To which it was answered by the Plaintiffs Counsel, That Equity consists purely in Action, and is only to be come by, by the Process of this Court; and cited Cole and Moor's Case, 5 Jac. Moor's Rep.

Windham was of Opinion that the Benefit of this Agreement is not devisable: for Things that consist in Privity must be carried on in Privity; and Sir Hugh Middleton could not have inforced the Devisee, unless he had pleased, to pay the Money Bishop was to pay, and the Remedy ought to be reciprocal.

The Remedy of an Agreement ought to be reciprocal. 2 *Vern.* 415, 416.

Wyld. Sir Hugh had an Equity to the Residue after the Debt and Portions paid, and it was a Crime to sell a Thing twice, and the Defendant was particeps Criminis, and so no Decree ought to be for him; but would have Sir Samuel Jones and the other Trustees for Sir William Middleton, in whom three Parts of the four were vested in Point of Law, convey fourteen Shares to the Lady Cornbury and her Heirs.

The Consent of the Heir makes good a void Devise.

He who has done Iniquity shall not have Equity, see 2 *Chan. Cases* 15, 17. *Ant.* 96, 102, 202. *Post.* 293, 250. 1 *Vern.* 53.

Lord Keeper agrees with Wyld that the clear Equity and Conscience was with Bishop's Title, and that the Defendant Simon Middleton did interlope; but did much doubt upon the Devise: Yet forasmuch as Bishop's Heir was a Defendant, and consents to the Devise by Answer, did decree, that Sir Samuel Jones and the Six Clerks to whom he had conveyed by Order of this Court, should convey, by Consent of the Heir of Bishop, fourteen Shares to the Lady Cornbury and her Heirs.

Vide post. 212. *Hard.* 87.

The Lord Keeper upon the Hearing by himself alone in June 1670. being of Opinion to dismiss the Bill, and the Court being now divided in Opinion, the Defendant Simon Middleton petitioned for a Rehearing, and had a Hearing accordingly in July 1671. before the Lord Keeper, Master of the Rolls, Rainsford, Wyld and Windham.

And now upon this Rehearing, it was for the Defendant Simon Middleton insisted, that the Agreement with Bishop did not bind, for the Reason supra; and farther, that the Agreement it self was imperfect, because the Money was to be paid as the Trustees should agree, and they did never agree to it, but Henry Middleton the only acting Trustee did, so soon as he heard of it, utterly disagree to it; and also for that the Agreement with Bishop was not pursued, for the Agreement with Bishop was in June 1657. and by that the Conveyances were to be executed in August next, but those not so much as prepared, nor any Thing done in Time, and but 250 l. paid, and the Defendant Simon had paid above 15000 l. and had a Conveyance by Deed and Fine of the whole thirty-six Shares (Bishop's Contract being but for fourteen Shares executed above

twelve Years since) and had been in the Possession of the whole thirty-six Shares ever since; and that the Company of the New River had bought in an other Thirty Shares from Sir Edward Ford, which was united to ours of the New River, and mixt with it, and could not be distinguished, and that no distinct Account could be taken, and so it was impracticable to decree the Performance of the Agreement with Bishop; nor could Sir Hugh have compelled him to perform the same. And if the City which was lately burnt had not been rebuilt, or any other Loss had befallen the Water-Work, the said Sir Hugh could never have compelled the Lady Cornbury to pay the Money; and the Heir's Consent, tho' it may bind himself, shall not put a Bargain upon an other.

Consent binds the Party, but shall not bind an other. *Vide ant.* 141. 1 *Vern.* 273.

But it was for the Plaintiff insisted, that the Money Bishop was to pay, was enough to pay all the Debts and Legacies of Sir William Middleton, and thereby all the Trusts precedent to Sir Hugh might have been satisfied, and so Sir Hugh had a clear Title to the Surplus; and he was looked upon as the Owner; and the Contract with Bishop was in Pursuance of the Trust, and he might by a Bill have compelled the Trustees to sell: And that the Reason why the Agreement was not pursued in Time, was because Sir Hugh Middleton's Occasions drew him to the Bath; and he writ a Letter to have it respited till he came back, which was not till after August. And the Defendant Simon was a wilful Purchaser, with Notice of the Agreement, and Sir Hugh would have performed with Bishop, if Sir Hugh had not been perswaded by Simon; and Bishop did endeavour to take up Money of Sir George Prat for that Purpose; and that these Doings of Simon were against Conscience, and that in Conscience the first Agreement ought to be performed; and the Court ought to decree with, and not against Conscience.

A Purchaser with Notice. *Vide ant.* 34, 36. 2 *Chanc. Cases* 48, 73, 136, 161, 156. 1 *Vern.* 27, 52, 49, &c.

Windham adheres to his first Opinion, (viz.) that the Bill ought to be dismissed, for he was not satisfied that Sir Hugh had any such Interest as he could contract for; nor is it well come to the Lady Cornbury, tho' Sir Hugh might by a Bill inforce the Trustees to sell; for what a Man may do himself, is not transferrable in all Cases; and what a Man cannot transfer, he cannot oblige by Articles. If Sir Hugh could not grant, he could not by the Articles bind; his Interest is but a meer Possibility contingent; in its Creation it is so. Sir William hath a Power to

What a Man cannot transfer, he cannot oblige by Articles.

charge, and doth so by his Will; and Sir Hugh could not dispose in his Father's Life-time, and what Sir Hugh should have is uncertain, for the Trustees might sell so much as to perform the precedent Trust. Nor was it intended by Sir William that Sir Hugh should sell. If Sir Hugh had had the Possession with this contingent Interest, it might have gone far; but Sir Hugh had no Possession. If Sir Hugh had covenanted the Trustees should convey, Equity ought not to decree him to procure them to convey, but to leave the Covenantee to his Covenant at Law; and by the Agreement the Payment of the Money is intangled, and doth not pursue the Trust; and Mr. Bishop could not inforce his Interest; nor is the Devisee bound to pay the Money, nor shall she take it up or lay it down as she pleases. Cases that rest in Privity are to be carried on in Privity, and Strangers not to be ingaged in it. The Heir comes in as improper as the Defendant, and that cannot help it.

If *Cestui que trust* covenants that his Trustees shall convey, and he hath no means to force them to make such Conveyance, Equity ought not to decree him to procure them to convey, but to leave the Covenantee to his Covenant.

Cases that consist in Privity, are to be carried on in Privity.
1 *Vern.* 467, 472.

Wyld. This is a Case in Equity and in Conscience, and this Court is to help that side that hath Conscience. The Case is on a Trust, and that proper here, and an Interest in a Trust is in Equity assignable or devisable. And if Land be conveyed for Payment of Debts and Legacies, and what remains to be to the Heir, the Heir may dispose, and the Fine to Simon Middleton by Henry doth nothing. For it is but the Fine for one Tenant in Common which passeth but his own Share. Possibly a Fine and Non claim may bar in Equity, but not here, for a Bill was presently filed. Notice is all in all in the Case; and it is against good Conscience for Simon Middleton to enjoy; and the Court must judge with Conscience, and not against Conscience. If this be an Interest it is devisable; and it is but Circuity of Action to bring the Heir to revive; for if he will not execute the Estate to the Devisee, she must bring a new Bill against him. And concluded, that there ought to be a Decree for the Plaintiffs, but no Action to be but of the 7650l. to be paid by the Defendant, and to convey fourteen Shares of the thirty six Shares, and the mesne Profits to go against Interest.

A Fine of Tenant in Common passeth but his own Estate.

Equity prevents Circuity of Action, &c. See 1 *Vern.* 22, 266, 273.

Rainsford conceived the Plaintiff ought to be relieved, for Sir Hugh had an equitable Interest that might be transferred in Equity, tho' it was in its Creation contingent; and we are not to take our Measure as it stood in the Creation, but as it stood when the Contract was made with Mr. Bishop, and he that may transfer may covenant, That

Interest to be considered as it was at the Time of the Contract, and not at the Time of its Creation.
1 *Vern.* 168.

his Truſtee ſhall do it. And Simon Middleton injuriouſly comes in with Notice, and threatens Sir Hugh into this Contract, and conceived Biſhop might deviſe, and concluded as Wyld did.

The Maſter of the Rolls agreed with Rainsford and Wyld, and looked upon the Agreement with Biſhop to be in purſuance of the Truſt.

The Lord Keeper when he firſt heard this Cauſe, was of Opinion to diſmiſs the Bill; but that was on a Miſtake; for he did conceive that all the Truſtees had conveyed to Simon Middleton; whereas it ſeems that Henry Middleton (who was but one of the Truſtees) had conveyed to the ſaid Simon. It is a Cauſe of great Conſequence, and the Truſtees were truſted as well for Sir Hugh as the others, and conceived the Plaintiffs ought to be relieved. Biſhop hath the firſt Agreement, and Simon Middleton the ſecond, and Equity ought to decree with the firſt, and the Fine and Conveyance carries no more from Henry than his fourth Part, and carries Sir Hugh's Equity no farther; and ſo decreed, That out of the three Parts remaining, fourteen Shares of the thirty-ſix Parts ſhall be conveyed by the ſix Clerks to the Lady Cornbury and her Heirs, and no Account of meſne Profits, but thoſe to go againſt Intereſt. And as to Ford's Water-Work, if it can be ſevered, it cannot be taken into the Decree; but if it cannot, there muſt be an Allowance for it, and ſo it was decreed accordingly. And whereas the ſaid thirty-ſix Parts were charged with a Rent of 500 l. per Ann. to the Crown in Fee, and 100 l. per Ann. to Henry Middleton for Life; and Sir Hugh in his Agreement with Biſhop, had covenanted to diſcharge the fourteen Shares he had agreed to ſell Biſhop from thoſe Rents. It was farther decreed, that the Plaintiff ſhould enjoy the fourteen Shares diſcharged of thoſe Rents, and that the other twenty-two Shares ſhould be ſubject to the Plaintiff's Indemnity therein, notwithſtanding it was inſiſted, that Sir Hugh's Covenant to diſcharge the fourteen Shares of thoſe Rents was meerly perſonal, and did not, nor could charge the whole Rents upon the twenty-two Shares.

Hard. 87. *Con. ant.* 209.

See the Caſe in 2 *Vern.* 431. That the Act of Parliament relating to the *New River* Company, ought to have a liberal Conſtruction for the Benefit of the City.

DE
Term. S. Mich.
Anno Regis 23 Car. II.
IN
CANCELLARIA.

The Lord Keeper.

Washborn *against* Downs. December 5.

THE Question was, Whether a Recovery by Cestuy que Trust should bar as in a Case of an Estate at Law.

The Court held clearly, that a Fine of a Cestuy que Trust will bar the Estate, but not the Remainder over to another; because a Fine will pass or extinguish all Right or Title which the Cognizors have in the Land. But it was doubted, whether by a Recovery of Cestuy que Trust any thing be barred: For that if Tenant in Tail at Law suffer a Recovery, legal Exceptions may be taken to it; but if a Recovery may be in Equity, all those Exceptions are taken away; and as to the Case of Goodrich and Brown, fol. 49. it was said, that was without a Precedent; and the Plaintiff in that Case doth not rely on his Decree; but the Matter was afterwards compromised. And it was a Question in Bathurst's and Emason's Case; and that Case was agreed.

By the Fine of a *Cestuy que Trust* in Tail, the Entail may be barred. *Vide ant.* 208 to 211.

The Court in the principal Case took Time to advise, and advised the Parties to agree. And in the Debate of this Case, it was said that a Perpetuity is, where if all that have Interest, joyn, and yet cannot bar or pass the Estate. But if by the Concurrence of all having the Estate Tail may be barred, it is no Perpetuity.

The Definition of a Perpetuity. *Vide ant.* 8, 33. *Post.* 230, 239, and the D. of *Norfolk*'s Case.

Sir

Sir Robert Atkins *againſt* George Mountague.

S. C. 1. *Ventr.* 149, 150.
2 *Jon.* 176.
2 *Keb.* 808.

THERE was a Trial at Bar touching the Title of the Maſter of the Hoſpital of St. Katharine, which the Plaintiff claimed by a Grant from the Queen Conſort, that now is; and the Defendant held and enjoyed by two Grants, one from Henrietta Maria, the Queen Dowager; another from his Majeſty that now is, before his Marriage.

Upon the Evidence divers Points aroſe.

Monaſticon, 2d. Part 460.

1. The Plaintiff's Title was founded upon the Charter of Queen Eleanor, Dowager of H. 3. (which ſee in Dugdale) who added to the Endowment of this Hoſpital moſt Part of the Poſſeſſions,

Reſervatis nobis & Reginis Angliæ nobis ſuccedentibus plenam poteſtatem providendi Magiſtrum, &c. Volumus etiam, quod omnes Reginæ nobis ſuccedentes Jus Patronatus habeant, &c.

which was confirmed by the ſubſequent Charters of E. 2. and E. 3.

2 *Keb.* 808.
Co. Lit. 8. *Prince's* Caſe.

2. Againſt the Foundation of this Title the Defendant's Counſel objected, That a Limitation of the Patronage Reginis ſuccedentibus by Charter is void, for ſuch a deſultory kind of Inheritance cannot be limited but by Act of Parliament, juſt as the Dutchy of Cornwal was by Act of Parliament in 11 E. 3. limited to the King's eldeſt Son for the Time being.

Difference between an Advowſon *in eſſe* and the Patronage of an Hoſpital newly created.

But Hale Chief Juſtice and whole Court reſolved to the contrary; for they took a Difference between an Advowſon in Eſſe and the Patronage of an Hoſpital newly created; for the Land or an Advowſon, 'tis true, no deſultory kind of Inheritance can be limited without Act of Parliament, becauſe then he who had Right could not always know againſt whom to bring his Action: But of the Patronage of an Hoſpital newly founded there can be no precedent Right, and therefore at the very firſt Inſtitution it may be limited as the King pleaſes, like the Caſe of a Rent de novo.

Tho' the ſeveral Patents were produced on each ſide, wherein the Maſter of the Hoſpital had been granted in Reverſion, yet reſolved by Hale, and the whole Court, that all

such Grants were void: For the Master of that Hospital, when he is seised in Fee in Right of the Hospital, and of an Estate in Fee-simple, there can be no Reversion to grant. Therefore this Case is not to be compared to the Grant of an Office in Reversion, but is more like the Case of a Prebendary or a Donative, which cannot be granted in Reversion.

Master of an Hospital, Prebendary, Donative not grantable in Reversion.

3. Then it was objected by the Plaintiff, that the Defendant's Grant from the Queen Dowager was void, because there was a former Grant which the Queen Dowager made to one Mr. H Mountague, who was alive at the Time of the Grant to the Defendant. The Defendant shewed that the Grant to H. Mountague was void, because it was Habend' post mortem Sir Julius Cæsar, and so a Grant in Reversion, which was held a clear Answer.

1 *Vent.* 151.

4. It was resolved, That in a Patent which grants the Mastership of an Hospital, the Words are not to be so precisely examined as in a Patent of Land or other Office; for in this Case it is sufficient, if there be Words of Nomination only, because the Patentee is not in by the Patent alone, but by the original Constitution upon the Foundation.

Diversity between the Grant of the Mastership of an Hospital, and a Patent for Land.

5. It was said by Hale, that tho' here the Question be touching the Interest of a Queen Dowager in the Patronage when there is no Queen Consort; yet it seemed to him that if there be a Queen Dowager and Queen Consort both at the Time of the Voidance of the Hospital, the Queen Dowager shall present.

8 *Ass. pl.* 29 and 31.

6. If the Dowager's Grant be good, when there is a Queen Consort, it is much more so when there is none; and if there could yet remain a Scruple, the King's Grant and Confirmation clears it; for if there be no Consort nor Dowager, doubtless the King's Presentation is good: And this alone is sufficient to support the Defendant's Title.

The Plaintiff replied, That the King's Presentation in such Case was good only by way of a provisional Supply until a Consort come, and then was to cease.

Which all the Court denied; for the Master by his Incumbency gains a Fee-simple, which cannot be determined by the Determination of the Plaintiff's Interest; as in the Case of the Dutchy of Cornwal: If the King let the Land, the Lease is void when the Prince is born. But if he present to an Advowson, the Clerk continues.

Wherefore the Plaintiff seeing the Opinion of the Court against him, became nonsuited.

DE

DE
Term. Sanct. Hill.
Anno Regis 23 & 24 Car. II.
IN
CANCELLARIA.

The Lord Keeper.
Juſtice Twiſden.

Suſanna Holford *againſt* Holford. Febr. 9.

A Conveyance cannot be fraudulent againſt Articles, except another Conveyance be executed according to the Articles.
Articles not purſued, *vide ant.* 59, 103, 170.

THIS Cauſe having been formerly heard, and the Plaintiff claiming under Articles of Marriage between her Father and Mother, whereby in Conſideration of a great Portion, her Father did agree to ſettle the Lands in Queſtion on himſelf and his Wife and their Iſſue (whoſe Iſſue the Plaintiff is); but tho' he lived ſome Years after, did not execute any Conveyance. And the Defendant, being the Plaintiff's Father's Brother, claimed by a Deed of Intail made by the Plaintiff's Father ten Years before the Articles (whereby for Failer of Iſſue Male on his own Body the Lands were limited to the Defendant). It was directed to a Trial on this Iſſue, Whether the Deed, by which the Defendant claimed, was fraudulent or not, and the Defendant to admit the Plaintiff a Purchaſer, that the Fraud might come in Iſſue. A Trial was had, and it was found againſt the Plaintiff.

Trial of a Deed, whether fraudulent.

And now for the Plaintiff it was prayed there might be a new Trial, and that the Defendant might at such Trial admit the Plaintiff had a Conveyance: For as it stood upon Articles the Defendant's Conveyance could not be taken to be fraudulent against the Articles, nothing passing in Law thereby, and yet it would be fraudulent against a Conveyance.

And therefore it was insisted, the Defendant ought to admit the Plaintiff had a Conveyance, tho' not such a one as to bar the Estate Tail, yet a Conveyance by Way of Lease and Release; as if the Plaintiff's Father was seized in Fee, and then the Matter of the Fraud would properly come in Issue, which the Court denyed, and so dismissed the Bill. And in the Arguing of this Cause, it was admitted, that every voluntary Conveyance is prima facie fraudulent against a Conveyance for Consideration.

A voluntary Conveyance is *prima facie* void against a Purchaser. *Vide ant.* 59, 100, 103, 170. 1 *Vern.* 365, 464. 2 *Chan. R.* 265.

The Lord Keeper.
Chief Justice Hales.
Justice Wyld.
Justice Windham.

Chaumond Roscarrick, *Esq; against Serjeant* Barton. February 21.

MAY 12. 10 Jacobi, Charles Roscarrick on his Marriage with Dorothy his Wife, settles the Lands in Question (inter alia) on himself for Life, Remainder to Dorothy for Life, Remainder to the Heirs Males of his own Body; he hath Issue Charles his first, and the Plaintiff his second Son, and dies; Dorothy marries with one Greenvil, and they enter on the Lands in Question as the Jointure of Dorothy.

Charles, the Son, 15 Novemb. 13 Car. 1. by Deed, Fine and Recovery for 800 l. conveys the Lands in Question to Greenvil and his Wife, to the Use of Dorothy for Life, Remainder to the Use of Charles and his Heirs, till he fail to pay several Sums at several Days, amounting to 800 l. and after Default of Payment of any Sum, to Greenvil and his Heirs.

Of Equities of Redemption, *vide post.* 219, 220, 228, 271. *Ant.* 2, 51, 52, 59, 68, 102.

Afterwards 14 Car. 1. Charles on his own Marriage ſettles the Lands in Queſtion, inter alia, to himſelf for Life, Remainder to Margaret his Wife for Life, Remainder to his firſt and other Sons in Tail, Remainder to the Plaintiff in Tail. In 1650. Greenvil aſſigns his Eſtate which was for the Security of the 800l. and was forfeited to the Defendant by the Conſent of Charles. In 1656. upon a Bill exhibited by the Defendant in Chancery againſt Charles, It is decreed Charles ſhall pay the Defendant what is due to him, (viz.) 1250l. or the now Defendant, Plaintiff in that Cauſe, to hold againſt Charles, and all claiming under him. Charles dies without Iſſue Male, Dorothy lives till 1668. then the now Plaintiff exhibits his Bill to redeem, and alledges that the Decree againſt Charles was by Conſent, and that it was agreed between Charles and the Defendant, that notwithſtanding the Decree, it ſhould be ſtill a Mortgage in the Defendant's Hands, and be redeemable upon Payment of Principal and Intereſt; and however that the Plaintiff being no Party to that Decree, and Charles but Tenant for Life, that Decree could not bind the Plaintiff. And as to the Pretence of an Agreemen tbetween Charles and the Defendant, that notwithſtanding the Decree the Eſtate ſhould remain ſtill a Mortgage in the Defendant's Hands, there was no Proof of any ſuch Agreement or Conſent, but only told Charles he would come to an Account; but there being Dealings and Accounts between the Defendant and Charles, it was declared by the Lord Keeper (who firſt heard this Cauſe in July 1671.) that general Words not particularly applied ought not to ſhake a Decree; for if they did, there would be no End of Suits.

General Words cannot be applied to Particulars.

But then it was inſiſted for the Plaintiff, that he being no Party to the Decree was not bound thereby, and that he had an Equity to redeem, and that the Mortgage was not to be taken to be more ancient than from the Time of the Aſſignment to the Defendant, for that an Account being then ſtated with Greenvil, and he paid off, there was no Account to be precedent to that, and ſo could not be taken to be elder than 1650. and that ſo the Plaintiff ought to be admitted to redeem, and the rather, for that the Defendant had Notice (which was admitted) of the Deed 14 Car. 1. by which the Plaintiff claims before he took the Conveyance from Greenvil; and whether the Plaintiff ſhould redeem the Lord Keeper doubted, but took Time to conſider.

An old Mortgage aſſigned to another, ought to be taken as a new Mortgage from the Time of the Aſſignment.
Vide ant. 68.
Poſt 220.
1 *Vern.* 132.
2 *Vern.* 377.

And

And now 21 Feb. 1671. this Cause was finally heard before the Lord Keeper, assisted with Chief Justice Hale, Mr. Justice Wyld and Baron Wyndham.

It was insisted for the Defendant, the Plaintiff was no Party to the Deed of the Mortgage, and that the Deed of 14 Car. 1. by which the Plaintiff Chaumond claimed, howbeit it was made in Consideration of Charles his Marriage, was to Chaumond the Plaintiff purely voluntary. And that albeit a voluntary Conveyance would pass an Equity of Redemption, yet in this Case where the Plaintiff claims an Equity by way of Intail, it ought not to be countenanced in Equity; for that the Consequence of it would be to make an Equity of Redemption perpetual. If a Mortgagor after a Mortgage made may make himself Tenant for Life of that Equity, with Remainder in Tail, as here, Remainder for Life, &c. which being but a Right of Action, a Right to a Bill in Equity ought not to be so intailed, and that this was not such an Inheritance as was intailed by the Statute de donis, &c. but being a Right of Action vested in the Father, with Remainder to his first and other Sons before Chaumond, there was no need to have made Chaumond Defendant to the said Decree: And Dorothy who was the Tenant for Life lived 'till 1668. so that the Mortgage was all that Time but of a dry Reversion, and Margaret the Wife of Charles, who lived until very lately, and who had a Title of Redemption precedent to the Plaintiff, did not seek to redeem.

A voluntary Disposition of an Equity of Redemption is not to be favoured.

An Equity of Redemption intailed tends to make it perpetual.

An Equity of Redemption not intailable within the Statute.

Wyndham was of Opinion as this Case was, that the Plaintiff ought not to be admitted to redeem.

Judge Wyld. There is no Fraud in the Settlement 14 Car. 1. and a Decree against Tenant for Life will not bind him in the Remainder in the Case of an Estate at Law; and he did not see why it should bind in Equity, and so he conceived the Plaintiff was relievable.

Chief Justice Hale. By the Growth of Equity on Equity, the Heart of the Common Law is eaten out, and legal Settlements are destroyed; and was of Opinion, there is no colour of a Decree. In 14 R. 2. the Parliament would not admit of Redemption; but now there is another settled Course; as far as the Line is given, Man will go; and if an hundred Years are given, Man will go so far, and we know not whither we shall go. An Equity of Redemption is transferrable from one to another now, and yet at Common Law if he that had the Equity made a Feoffment, or le-

Note this: Equity on an Equity.

Equity of Redemption carried too far.

Note, by 1 *Vern.* 132, That a Fine and Nonclaim will not bar a Mortgagor of his Equity, *post.* 268, 278.
Antiquity a Cauſe to deny Redemption. *Vide ant.* 102, 218.
A Decree to foreclose Tenant in Tail from redeeming, concludes his Iſſue and the Remainders.

vied a Fine, he had extinguiſhed his Equity at Law; and it hath gone far enough already, and we will go no further than Precedents in the Matter of Equity of Redemption, which hath too much favour already; and concluded there ſhould be no Decree for the Plaintiff in reſpect of the Antiquity, and if he will redeem, he muſt come in Time. It is but juſt to foreclose for not coming in Time: It is juſt to deny Redemption if he come not in Time. And a Decree to foreclose a Tenant in Tail ſhall bind his Iſſue in an Equity of Redemption, becauſe that is a Right ſet up only in a Court of Equity; and ſo may be here extinguiſhed; and the Eſtate moved from Charles to the Mortgagee, and not from the Plaintiff; and Charles was the viſible Poſſeſſor and Owner. And it is a great Sore, that Mortgagees are but Bailiffs; and the Limitation to Chaumond was but voluntary, and ſo the Plaintiff's Pretence is not to be ſupported againſt a Purchaſer, for ſo a Mortgagee is; and here it is made abſolute by the Decree; and if there be divers Remainders of the Equity, there is no Reaſon to make them all Parties.

The Lord Keeper concurred with him, and ſaid he, it goes current, that if a Mortgage be twenty Years old, the Mortgagee ſhall have no Intereſt on Intereſt: But herein he is not ſatisfied, eſpecially in this Caſe, where the Defendant could not get into Poſſeſſion by Reaſon of the Eſtate for Life to Dorothy, who lived 'till 1668. and was clear of Opinion that the Plaintiff ought not to be admitted to redeem. And made great Difference between Parties that come to redeem, who are no Parties to the Mortgage, and thoſe that are Parties to the Mortgage. And ſo the Bill was diſmiſt.

A Difference between Parties to the Mortgage coming to redeem, and Strangers.
1 *Vern.* 336.

The Earl of Athol *in* Scotland *againſt the Earl of* Derby, *and the Adminiſtrator of the Counteſs of* Derby.

Sequeſtration againſt a Peer, &c. *vide* 222.

JAmes Earl of Derby Tenant for Life makes a Leaſe for one and twenty Years to his Wife of the Iſle of Man, for Proviſion for younger Children, and dies; ſhe agrees with the Earl of Athol, on the Marriage of her younger Daughter the Lady Emilia, to give him 5000 l. Portion, and that he ſhall have the Iſle of Man, valued at 1000 l. per Ann. for five Years to pay it. Charles Earl

of Derby his Son, the Defendant, opposed this Lease, being made by Tenant for Life, and between Baron and Feme; but by the Mediation of certain Lords in Parliament, Earl Charles and his Mother came to a new Agreement in the Year 1660. That she shall have the one Moiety of the Profits of the Isle, and he the other. In 1661. They came to a new Agreement, that he should in lieu of the Agreement pay his Mother 500 l. per Ann. and in the Close of the Deed appoints his Receiver for the Isle of Man to pay it. All these Agreements were made by the Countess on Behalf of the Earl of Athol, to enable him to receive the 5000 l. and then the Countess dies.

It was decreed by the Master of the Rolls, that the Earl of Athol shall have his 500 l. against the Earl of Derby, and his Person to be charged, and the Earl of Athol shall not be forced to the Isle of Man, which is the Place originally charged; for by the last Agreement he is to pay 500 l. per Ann. absolutely, and in lieu of the Profits, let the Earl of Derby make what he will of them; and the Appointment of the Receiver to pay it is but directory, and if the Receiver do not pay it, the Earl must.

Maynard and other of the Plaintiff's Counsel held that the Court could not by any Decree bind the Isle of Man; nor if they should decree it, could they execute the Decree there, it being out of the Power of any Sheriff. They also held that the Letter of Attorney being determined by the Countess's Death, that the Court would not have made a Decree for the Earl, though her Administrator is Defendant, unless in the Case of a Marriage Agreement, and that it was proved those Agreements were made on his Behalf. Afterwards Sequestration was awarded against the Earl of Derby.

The Isle of *Man* out of the Power of the Court.

1 *Roll. Abr.* 373. *M. Pl.* 1.

Sequestration.

Whereupon a Question arose, What Time of Privilege a Peer hath (viz.) whether twenty or ten Days before and after Session of Parliament?

The Lord Keeper sent to the Lord Hollis and others to advise in it, and they produced two Orders in the House of Lords, whereby it appeared they declared their Privilege to commence from the Teste to the Writ of Summons for their first coming to Parliament. And that upon every Session and Prorogation their Privilege is for twenty Days after such Session. And it is said in the Orders, that it is a sufficient Time for them to come from all

Privilege of Peers in Parliament when it commences and when it ends.

all Parts of the Kingdom, and to return, and are in those Orders desired to take Notice of it, and of the Reason of it.

Those Orders are, the one of the 24th of May 1624. the other of the 27th of January 1628. entred into the Journal of the Book of the Lords House.

But it is said, the Commons never agreed hereto, and therefore think themselves not bound by it.

Note; This Sequestration was executed accordingly; but the Earl of Derby soon after dying, and the Estate being intailed, the Earl of Athol lost the rest of his Wife's Portion.

Of Sequestrations in Chancery, *vide ant.* 92. *post.* 241. *Curs. Canc.* 76, 365, 369, and 89 to 92. 2 *Chan. R.* 192, 244. 1 *Chan. R.* 64, 153, 188, 248. 3 *Chan. R.* 87. 2 *Chanc. C.* 44, 46. 1 *Vern.* 58, 160, 228, 247, 248, 421, 118, 166. 2 *Vern. q. New Ca. in Eq.* 194.

DE

DE
Term. Sanct. Hill.
Anno Regis 25 Car. II.
IN
CANCELLARIA.

The Lord Keeper Finch.

Hayes *againſt* Hayes.

A. Seized in Fee, deviſeth to his Heir, on Condition that he pay to the Daughter of A. 500 l. at her Age of ſixteen Years, and on Default, that he ſhould enter and raiſe it; the Heir deviſeth to his Mother for Life, and afterwards to his Brother in Fee, and dies; the Mother enters, the Daughter is under Age, and the Brother having the Reverſion and Inheritance, exhibits his Bill to have the Mother pay a Part of the 500 l. ſhe having Part of the Eſtate as Security for Life.

Tenant for Life ſhall contribute with the Reverſioner toward the Arrears of a Charge or Mortgage.
Vide poſt. 246, 271.
1 *Vern.* 347, 404.
1 *Chan. Rep.* 35, 120, 150.
Ant. 31.

It was objected, that the Daughter is not of Age, and ſo this Bill is quia timet only; and it may be that the Mother may live till the Daughter is of ſixteen, and then the Daughter may enter and raiſe, and ſo the Brother, who is the Reverſioner, ſhould not be grieved; and the Court would be vexed with vain Suits if any one might be admitted to ſue only quia timet, to prevent a remote Poſſibility.

But the Court anſwered, that Suits quia timet only were proper in Law and Equity: It's Law of a Warrantia Chartæ in Equity, as where A. grants a Charge of 100 l. per annum in Fee, and deviſeth to B. for Life, Remainder to C. in Fee, and dies, C. exhibits his Bill to compel the Tenant for Life to pay the Arrears, elſe all will fall on the Reverſioner; and this hath been decreed; and the

Suits *quia timet* in Law and Equity.
Vide ant. 3.
1 *Vern.* 190.

the firſt Cauſe about Contribution was between ..... and ..... where A. had mortgaged the Manor of Guilford for 2500l. and then deviſeth to B. for Life, the Remainder to C. in Fee, C. preferred his Bill to force B. to pay his Share of the Mortgage-money; and it was decreed that he ſhould: And there have been twenty Caſes ſince of the like Nature. So in the principal Caſe there being a Demurrer to this Bill for the Cauſes aforeſaid, the Defendant was ordered to anſwer; and then Sir John Churchil moved, and ſaid for the Defendant, that ſhe ſhould prove it was the Intention of the Deviſor here that ſhe ſhould pay nothing, which was not anſwered, but was admitted to be material.

Poſt. 271. *Max. Eq.* 14. 1 *Vern.* 404. Equality is Equity.

The Intention to be regarded. See *Max. Eq.* 32, *&c.*

The Lord Keeper Finch.

Butler *againſt* Bernard. February 24.

AN Adminiſtrator makes (takes) a Mortgage of the Inteſtate's Term, and makes A. his Executor, and dies; B. takes out Letters of Adminiſtration de bonis non to the firſt Inteſtate, and claims the Reſiduary Intereſt and Truſt of the Term, and prays that he may have the Benefit of Redemption. But the Court decreed the Benefit of Redemption to A. the Executor of the firſt Adminiſtrator, who had aliened the whole Eſtate in Law of the Term, and was not poſſeſſed in auter droit, nor of any Part of the Intereſt thereof, but in his own Right; and ſo it ſhall go to his Executor, and not to B. the Adminiſtrator de bonis non.

A Term aliened by an Adminiſtrator ſhall go to his Executor, and not to the Adminiſtrator *de bonis non.*

Note; Either this Caſe is not truly ſtated, or the Equity thereof is not apparent. For it ſeems hard to conceive how an Adminiſtrator can be poſſeſſed otherwiſe than *in auter droit*; except as a Purchaſer, or otherwiſe veſting the Property in himſelf; as,

A. is indebted to *B.* as Adminiſtrator to *C.* on ſome Matters of Account between *A.* and *C.* And the Account being ſettled between *A.* and *B.* *A.* gives *B.* a Note for 100*l.* being the Ballance; and then *B.* dies inteſtate; this 100*l.* ſhall go to the Adminiſtrator of *B.* and not to the Adminiſtrator *de bonis non* of *C.* the firſt Inteſtate. For here the Accounting together and Giving of the Note, makes an Alteration of the Property of the Debt. (1 *Vern.* 473, 474.) *Quære* if it does ſo, in the Caſe *ſupra*?

DE
Term. S. Mich.
Anno Regis 25 Car. II.
IN
CANCELLARIA.

The Lord Keeper Finch.

Colonel Doyly *againſt* Perfull. October 25.

THE Wife having aſſigned her Term in Truſt for her ſelf before Marriage, and then the Husband without joyning with the Truſtees, does mortgage the Truſt, and the Husband being dead, the Mortgagee being Plaintiff, exhibits his Bill to have the Lands conveyed to him, or that they ſhould redeem; and the Court diſmiſs the Plaintiff's Bill; for ſince Queen Elizabeth's Time it hath been the conſtant Courſe of this Court to ſet aſide and fruſtrate all Incumbrances and Acts of the Husband upon the Truſt in the Wife's Term, and that he ſhall neither charge or grant it away: And 'tis the common way of Proceeding for the Jointures of Women, to convey a Term in Truſt for them upon Marriage, that it may be out of the Power and Reach of the Husband; neither ſhall he forfeit it by Outlawry or Felony, if for Jointure, or in Purſuance of Articles of Marriage, or being the Wife's Term it is aſſigned before in Truſt, as here, or if on other good Conſideration it be aſſigned. But if it be an Aſſignment after Marriage, by the Husband in Truſt for the Wife, this is voluntary and fraudulent againſt Purchaſers; and this was the great Exchequer Chamber Caſe.

The Husband cannot grant or charge the Term of the Wife in Truſt. *Q.* 2 *Vern.* 64. *ant.* 194. *poſt.* 266.

Nor forfeit it for Outlawry or Felony.

Aliter of Aſſignment after Marriage by the Husband.

DE
Termino Paſchæ,
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Davis *againſt* Curtis.

Ant. 16, 24.

Nota; The Bond determined the parol Agreement.

DAVIS Executor of C. imployed as a Maſter of a Ship by the Eaſt-India Company, covenants with them that he ſhould pay a certain Mulct for every Cloath carried, &c. in the Ship, and took the Defendant to be his Mate, who made an Agreement mutatis mutandis, with Davis, and gave a Bond of 50l. for the due Performance of his Part; but he without Davis's Knowledge carried ſo many Cloaths as the Mulct came to 70l. which the Company deducted out of the Maſter's Wages, and the 50l. Bond would not ſatisfy, and therefore prayed Relief and Diſcovery of the Teſtator's Eſtate.

* No Relief above Penalty in Equity. *Vide ant.* 77, 95, 97. 1 *Vern.* 342. 1 *Chan. R.* 95. *Max. Eq.* 3. *Curſ. Canc.* 210.

Bill to diſcover Aſſets, and does not charge that any Goods came to his Hands, ill. *Vide* 1 *Vern.* 106. 2 *Vern.* 49, and the Notes, *ant.* 57.

The Defendant demurred. 1ſt. The Relief of more than Security by Bond, not proper in Equity. 2d. That Part of the Bill which ſtands for Diſcovery of Aſſets was ill, becauſe the Charge in the Bill was not poſitive, that Aſſets, or that any Goods came to the Defendant's Hands; and ruled in both Points accordingly.

* Note; Equity will not ſuffer an Advantage of a Penalty or Forfeiture w her a juſt Compenſation can be made, *vide ant.* 95, 97, 170, 184. 2 *Chancery Caſes* 198, 219. 1 *Syd.* 442. yet will not relieve againſt wilful Forfeitures, *ant.* 95.

Cook *againſt* Bampfield. May 19.

Leſſee of a Prebend mortgageth his Leaſe, and after the Day pays the Money, and then ſurrenders, and takes a Leaſe from the Prebend, he hath good Equity againſt the Mortgagee. If the Prebend die, Equity ſhall not make the ſecond Leaſe good againſt the Succeſſor.

William Pierce, Prebend of Rutland-Denham, leaſed the Rectory of R. to Thomas Bampfield, George and Edward Bampfield, in Truſt for Thomas, who conveyed his Truſt to Sir R. P. but G. B. was no Party, but beyond Sea. The Prebend Leſſor dieth; Tiſdel his Succeſſor (on a Surrender to him of the former Leaſe produced to him, but G. B. ſealed it not, ſo that in Law it was void againſt G. B.) makes another Leaſe to Sir R. P. for three Lives, which Leaſe was for diverſe Years enjoyed till all thoſe three Lives died. Tiſdel being dead, Cook takes a Leaſe of Duncomb, who ſucceeded Tiſdel, for 400 l. Fine. George Bampfield comes from beyond Sea, and ſets on Foot his Title for a third Part. The Matter was by Reference put to Arbitration (the Point of Truſt or no Truſt being before by Direction tried by a Verdict for Cook, that G. B. his Name was uſed in Truſt for Thomas) and G. B. having by Trial at Law recovered one third Part of the Premiſſes, the Arbitrators awarded, that G. B. ſhould permit Cook to enjoy the ſaid third Part, paying 16 l. yearly to G. B. during his Life. G. B. died; the Plaintiff exhibits a new Bill againſt Edward B. reciting the former, and prays Relief.

Duncomb died, Aſton ſucceeds in the Prebendary; and before the laſt Bill Aſton for 120 l. makes a new Leaſe to Edward B. for three Lives, yet in Being. Edward B. was bound to Cook that G. B. ſhould perform, which in all George's Time was on all Sides executed. Aſton received the Rents of Cook after Duncomb's Death: 27 Novemb. 23 Car. 2. It was decreed that Edward and George B. ſhould pay to Cook all the Profits received, deducting the 16 l. per Annum, and that Edward B. ſhould aſſign his Leaſe to Cook for three ſuch Lives as he ſhould name: And on a Bill of Review this Decree was confirmed by the Lord Keeper Finch 10th of May inſtant, Ellis and Littleton concurring.

The Objections againſt the Decree were, Firſt, That the Leaſe of Duncomb was not good in Law, being of the Whole in Poſſeſſion and Reverſion, when at the Making thereof George B. was Tenant for Life for one third Part; which was not much denied, and being avoided by Act of Parliament, this Court might not ſupply it; and Aſton

the Succeſſor is not bound by any Tranſaction of the Account made in the Time of his Predeceſſor againſt an Act of Parliament. And it was as free for Edward B. to deal for an Eſtate with Aſton, the Prebend, as for any other Man; and that if there was any Equity to ſupport the Leaſe againſt the Leſſee or his Aſſigns, or againſt Duncomb, Predeceſſor to Aſton, that Equity ſhould not bind Aſton. Put the Caſe, the Leſſee of a Prebend or Biſhop ſhould mortgage his Leaſe, or Part of it, and after the Day pay the Money, and then ſurrender and take a Leaſe from the Prebend; he hath good Equity againſt the Mortgagee; but if the Prebend die, this Equity ſhall not make the ſecond Leaſe good againſt the Succeſſor againſt the Statute, which binds all Men, and hath no Saving of ſuch Rights of Equity; and the Chancellor may not add to a Statute to make a Saving which the Statute hath not made. An Infant bound by Statute of Fines, ſhould not have been help'd in Equity.

Chancery cannot help in Equity againſt an Act of Parliament. *Vide ant.* 56, 158, 205. 2 *Vern.* 58, 431, 711, 712.

But notwithſtanding the Decree was confirmed; for by the Surrender of Tho. who was Ceſtuy que Truſt, the Leaſe in Equity was avoided as to the then Prebend; and therefore ſhall never be ſet on Foot againſt a Succeſſor. Duncomb takes 400 l. Fine, and reſigns when there can no more Fine be made; and Aſton would now ſet on Foot the Statute and a new Fine, which appears againſt the Practice.

The 2d Objection. The Purchaſer from T. B. viz. R. P. took a new Leaſe for three Lives, whereby the Purchaſer had the full Benefit of his Purchaſe, and thoſe new Lives being now all dead, it is no Reaſon that Cook ſhould ſet on Foot the Intereſt of the old Leaſe again.

The Lord Keeper. Nor ſhall Aſton, nor Edward B.

The Decree was confirmed.

The Mayor and Aldermen of London *againſt the Earl of* Dorſet. May 30.

Examination after Publication and after Hearing. *Vide poſt.* 251.

UPON a Commiſſion of Charitable Uſes, The Queſtion on Appeal was, Whether certain Houſes were Part of Bridewell, belonging to the City for Relief of the Poor, or a Part of Dorſet-Houſe; which Point was referred to Law to be tried, and then to report. A. B.

A. B. moved for a Commiſſion to examine an old Witneſs eighty Years old, who was not diſcovered till now, and unable to travel. If ſhe was able to travel ſhe would be examined at the Trial; and tho' Publication an Hearing was paſt, yet the Queſtion being of Freehold, and not properly triable at Law, it was Reaſon that the Teſtimony ſhould not be loſt, and poſſibly the Land thereby. The Motion was oppoſed, becauſe of Publication.

Ant. 25, 73. *Poſt.* 236. *Kelw.* 96. *a. b.* 100. *a.* *Hard.* 180. 1 *Vern.* 253. 2 *Vern.* 197, 409.

The Lord Keeper. The Rule of Non-examining after Publication hath been ſtrict in this Point; but the Court is the Judge, and the Examiners, here or by Commiſſion, are miniſterial to the Court; ſo he ordered a Commiſſion and Examination.

Burges *againſt* Burges.

Truſt of a Term decreed from the Heir to an Adminiſtratrix. *Vide ant.* 8, 9, 33, 68, 213, &c.

THomas Burges, after his Intermarriage with Elizabeth Hughs his firſt Wife, by Leaſe and Releaſe, dated 24 July 1669. in Conſideration of his Wife's ſettling her Lands upon him and his Heirs (which was done by Fine) conveys divers Freehold Lands to the Uſe of himſelf for Life; and after his Deceaſe, to the Uſe of his Wife Elizabeth for her Life; and after the Determination of the ſaid Eſtates, then to the Uſe of the firſt Son of the ſaid Thomas, on the Body of the ſaid Elizabeth to be begotten, and the Heirs of the Body of ſuch firſt Son; and for Default of ſuch Iſſue, to the Uſe of the 2d, 3d, 4th, 5th, 6th, 7th, and every other Son and Sons of the Body of the ſaid Thomas, on the Body of the ſaid Elizabeth to be begotten, ſucceſſively, and the Heirs of the Body of ſuch Son or Sons; and for Default of ſuch Iſſue, then if at the Death of the ſaid Thomas the ſaid Elizabeth ſhall be enſeint with Child, then to the Uſe of Skinner and Clark, Truſtees, and their Heirs, until the Birth of ſuch after-born Child or Children; and if it be a Son or Sons, then to the Uſe of ſuch Son and Sons, and the Heirs of the Body of ſuch Son and Sons; and for Default of ſuch Iſſue, to the Uſe and Behoof of all and every the Daughter and Daughters of the ſaid Thomas Burges, on the Body of the ſaid Elizabeth begotten or to be begotten, as well which ſhall be born, as which ſhe the ſaid Eliz. ſhall be enſeint with at the Time of the Death of the ſaid Thomas, and the Heirs of the Body of ſuch Daughter

Daughter and Daughters; and for Want of ſuch Iſſue, to the Uſe of the right Heirs of Thomas and Elizabeth for ever.

Limitation of a Term being a remote Truſt, and tending to a Perpetuity, void. *Vide ant.* 8, 9, 33, 68, 213, &c. *ibid. Poſt.* 239.

Thomas Burges being likewiſe poſſeſſed of other Lands by two Leaſes for Ninety-nine Years, determinable upon three Lives, by an other Deed bearing Date with the fore-mentioned Deed of Settlement, for the Conſideration therein mentioned, did aſſign the ſaid Leaſehold Lands to Skinner and Clark, two of the Defendants, in Truſt, to the ſeveral Intents and Purpoſes, and for the Uſes which are limited and declared of and concerning the ſaid Lands of Inheritance of the ſaid Thomas Burges, in and by the ſaid Indenture, bearing even Date with the ſaid Deed and Aſſignment.

Thomas Burges had no Son by the ſaid Elizabeth, but had one Daughter, which is now the Defendant Elizabeth, who was alive at the Time of the Making of the ſaid Indenture, being 21 Dec. 1668. Thomas Burges ſurvived, and after married Urſula a ſecond Wife, by whom he had Iſſue two Sons and one Daughter, and died Inteſtate; and Urſula his Wife is Adminiſtratrix.

Qu. Whether the Truſt of the ſaid Leaſes doth belong to Elizabeth the Daughter, or the Adminiſtratrix?

After this Cauſe was ſtated, and the Lord Keeper Finch had took Time to conſider it, he declared that the Limitation (becauſe it was a remote Truſt, and tended to a Perpetuity) to the Defendant Elizabeth, as Daughter of Thomas Burges, was a void Limitation; and on that Reaſon decreed the two Leaſes to the Plaintiff, as Adminiſtratrix to Thomas Burges.

Of Perpetuities, and Limitation of Terms, ſee the Duke of *Norfolk's* Caſe, 3 *Chan. Caſes. Ant.* 8, 33, 68, 213. *Poſt.* 239. 1 *Vern.* 161, 164, 478. 2 *Vern.* 43, 195, 362, 363, 668, 692, 693, &c.

DE
Term. Sanct. Trin.
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Anonymus. July 2.

IF the Bill exhibited be grounded on the Loſs of a Bond, Oath muſt be made of ſuch Loſs, becauſe that ſuch Loſs is that which intitles the Court to Juriſdiction of the Cauſe, elſe the Party has his Remedy at Law. No Oath is required of Loſs of them, but only ut ſupra, where the Oath doth intitle the Court to Juriſdiction. By the Lord Keeper.

Where Oath muſt be made of the want of a Deed, Bond, &c. *vide ant.* 11. and the Caſes there cited. *poſt.* 292.

Organ *againſt* Gardiner. July 2.

AN Original Bill to execute a Decree of Lands againſt a Purchaſer, who claimed under Parties bound by that Decree, was allowed good on Demurrer thereto, by the Lord Keeper.

An Original Bill to execute a Decree againſt a Purchaſer, claiming under Parties bound thereby.

The Reaſon ſeems for that he had implied Notice of the Terms of the Decree. *Vide poſt.* 260, 291. 2 *Chanc. Caſes* 47, 48.

Aſh-

Aſhcomb's *Caſe*. July 15.

Ant. 169, 170. 2 *Chanc. Caſ.* 73, 7. Aſſignment of Bond in *Holland*, according to their Cuſtom, allowed here. *Vide poſt.* 238.

THE Bill was exhibited by the Plaintiff, a Feme Covert and her Friends, againſt her Husband and two others, Maſcal and S. The Caſe was, That the Plaintiff being a Dutch Woman brought 4000 l. Portion to her Husband, who agreed with her before Marriage to leave a compleat Maintenance for her Self and her Children, not expreſſing what; the Marriage took Effect, but he declining in Eſtate, her Friends called on him; and he thereupon aſſigned certain Bonds, wherein M. was bound to him; and a Letter of Attorney was made after to S. to receive the Money upon the Bonds, who received the Money of him. The Bill was to have the Money from M. and S.

Plea. Notice.

Maſcal by Plea ſets forth the Payment to S. and that he had no Notice of the Aſſignment of the Bonds. And this was allowed a good Plea for Maſcal. But S. pleaded a Letter of Attorney, and Payment to him on good Conſideration, but did not deny Notice; and therefore his Plea diſallowed, and the Agreement and Aſſignment of the Debt in Holland where ſuch Agreement between Husband and Wife, and ſuch Aſſignment of Bonds are good, and they are to be allowed here, by the Lord Keeper.

Anonymus. July 15.

Sewers Accounts Chancery will not intermeddle with. Difference between Commiſſioners of Sewers and Commiſſioners of Bankrupt. *Ant.* 19, 71. *poſt.* 275, 307.

A Bill exhibited to have an Account here of Money collected by Authority of Commiſſioners of Sewers diſmiſt by the Lord Keeper; for the Commiſſioners are to take the Account, and not the Chancery. Otherwiſe in Caſe of Receivers by Authority in Caſe of Commiſſioners of Bankrupt; for there it is concerning private Perſons, but this of the Publick; and it was in vain to take Accounts in that Caſe in Queſtion, which the Court cannot determine. And altho' objected, that a Diſcovery is proper here, yet the Bill was diſmiſt on Demurrer.

King *againſt* Brownlow. July 21.

A Bill was exhibited in Chancery concerning Tithes and Bounds of a Pariſh, which proceeded to Anſwer and Replication. Then he exhibited another Bill in the Exchequer, and there Witneſſes were examined, and now proceeds again in Chancery, and replies. The Defendandant pleaded the Proceedings and Examination in the Exchequer, and ruled good as to Examination of the ſame Matters, which being examined to there, were not to be examined in Chancery.

Matters formerly examined in the Exchequer, not to be examined here: Suit for Tithes.

Ant. 25, 73. *poſt.* 236, 229. *Kelway* 96. *a. b.* 100. *a.* *Hard.* 180.

Of Suits in Chancery touching Tithes, *vide ant.* 187. *poſt.* 272, 282. 1 *Vern.* 60, 185. 2 *Vern.* 46. *New Caſes in Equity* 117. *Curſ. Canc.* 40. 2 *Chan. Ca.* 32, 237. 1 *Chan. R.* 25. 'Tis True in 4 *Car.* 1. a Bill in Chancery for maintaining a *Modus Decimandi* was diſmiſt, as being a Matter proper for the Common Law or Eccleſiaſtical Court, 1 *Chanc. R.* 27. But divers Precedents were before that Time of the like Bills retain'd and decreed in this Court, (*vide ibid.* 25.) and it is now become an eſtabliſh'd Practice.

DE
Term. S. Mich.
Anno Regis 26 Car. II.
IN
CANCELLARIA.

Norcliff *and his Wife againſt* Worſley.

An Intail in Equity (not in Law) whether the Iſſue ſhall be bound by the Agreement of his Father without Fine. *Vide poſt.* 239. 2 *Chanc. Ca.* 63, 64, 78, 247.

THERE was Thomas Worſley, Beſail, Thomas le Ayle, Thomas le Pere and Thomas le Fitz. Thomas Great Grand father, in Conſideration of 800 l. and Marriage of the Grand-father with Wood, covenants to make a Settlement of the Manor of, &c. to Thomas le Ayle and Wood, whom he was to marry, for Jointure for the Wife and the Heirs Males of Thomas by his ſaid Wife. Thomas, the Grand-father, within one Year died, Thomas, the Father, then in ventre ſa mere.

5 Car. 1. Elizabeth, the Wife of Thomas deceaſed, obtains a Decree againſt the Beſail for the Lands, for Performance of the Articles both for her ſelf and Son, Father of the now Defendant. Thomas, the Father, 1652. obtains a Decree to the Effect of the former: It ſet out, that Thomas Beſail after the Articles, and firſt Bill and ſecond Bill, made voluntary Conveyances of the Lands, whereby he had ſettled them ſo as the Eſtate in Law was now in Elizabeth and the Son of John his ſecond Son, under Power of Revocation by Deed, and died after. Thomas, the Father, on Marriage with Penelope his ſecond Wife (he then

then having Iſſue the Defendant Thomas by his firſt Wife, and inheritable to the ſpecial Intail), agreed (as 'tis alledged) to ſettle the Land on his ſecond Wife and their Heirs by her; and pending the Suit, Elizabeth conveyed away the Lands to Thomas the Defendant. Thomas, the Father, being dead, Penelope, his Widow, and her ſecond Husband, exhibit a Bill to have the Lands ſettled on her for Life, viz 300 l. per Annum, Part thereof, and to have other Part thereof liable to Debts; for Thomas, the Father of the Defendant, had ſo ordained by his Will in Writing. After Publication in this Cauſe, Thomas the Son, exhibits his Bill againſt Norcliff and his Wife, grounded on an Agreement by Penelope with Thomas to accept of certain Lands, Part of the Lands in Queſtion, of 100 l. per Annum, in lieu of Jointure, Dower, and all Demands, which was executed ſeven Years by Enjoyment by Penelope.

Two Queſtions aroſe. 1. Whether the Agreement of Thomas, the Father, to ſettle the Lands, &c. on his ſecond Wife, did bind Thomas, the Son, by Reaſon that he was intitled in Equity to an Eſtate Tail in the Land; and therefore ſhould not be bound by his Father's Agreement? For if the Land had been ſettled in Tail, it could not bind the Iſſue, and the Right of an Eſtate Tail is deſcended on him: And the Plaintiff ſued for her Jointure raiſed on Equity; but it is a puny Equity to Thomas the Grand-child. The Conſiderations are on both Sides the ſame, viz. Marriage-Agreement and Portion; only the Defendant Thomas inſiſted, that his Agreement, by which he claims, was in general Terms for Lands of 300 l. per Annum, and not for Lands in Queſtion particularly. And alſo if it were for ſome of the Lands by particular Names, with Covenant that thoſe Particulars were 300 l. per Annum, if ſuch Agreement did bind as to the Particulars, yet the Covenant for the Value, nor the Will did not bind the other Lands ſo as to have the Value ſupplied out of the other Lands agreed to be entailed. And though if the Lands had been intailed, though the Father might have cut off the Intail by Fine and Recovery, yet without Fine or Recovery they could not; and there is no Fine, &c. nor any Attempt or Proceedings towards levying a Fine or Recovery.

Q. If an Agreement of the Father on a Marriage-Settlement ſhall bind the Iſſue in Tail by a former Venter.

See 1 *Vern.* 198, 203, 298, 299, 433, 471.
2 *Vern.* 295, 448, 482, 499, 671, 702, *&c.*

As to this Point the Lord Keeper Finch gave no Resolution; but said, he conceived a Difference in the Case, viz. Whether Penelope's Agreement was in general for Lands of 300 l. per Annum, or particular; and, if particularly relating to the Lands in Question, Whether so much was mentioned as amounted to 300 l. per Annum, or, which in Effect is the same? Whether it were not for 300 l. per Annum Lands, Part of the Lands formerly agreed by the Great Grand-father to be intailed, or in general for 300 l. per Annum Lands, without Relation to the Lands ut supra, by the Great Grand-father to be intailed. And therefore there was much Dispute as to the Fact in that Point.

But the Lord Keeper tho' he was not positive in the main Point, yet said that as to the Agreement by the Father, whether to be avoided by the Son, now Defendant, that in case the Lands had been intailed de facto, and agreed, no Agreement could bind the Issue without Fine or Recovery, or other legal Bar; yet he said the Agreement to intail was not an Intail; and though it raised an Equity against him that made it, yet that Equity is a Creature of this Court to be governed as Conscience directs by this Court: And said the Statute de donis was an ambitious Act in Favour of the Lords against the King; and for that vouched the Lord Ellesmere. But before he had said this, there were some Proposals of Agreement: And at length the Case was composed.

Where Equity creates the Estate, it shall be guided by Conscience.
2 *Vern.* 671.
Post. 255, 294.
2 *Rol. Rep.* 436.
2 *Vent.* 350.
Hard. 96.
1 *Levin.* 239.
Hob. 203.
1 *Roll. Abr.* 379. *pl.* 7.
Post. 294.
Ant. 172.

There was a second Point, which, if fully proved, must have ended the Cause, (viz.) the Agreement by Penelope, ut supra. But a Dispute arose about the Proof, Whether the Witness that proved the Agreement could be read? For the Agreement was not set forth in the Answer to Penelope's Bill, but was proved in that Cause; and it was set forth in the Bill against Penelope and her Husband, but no Proof thereof in that Cause; so it was proved in one, and set forth in another Cause. To salve which Defect, the Defendant Thomas moved, and had an Order, that the Depositions in either Cause might be used in both, which Order was after Publication in the first Cause, wherein the Proof was made; but before Publication in the second Cause; so as the Defendant in that Cause had the Advantage, having the Liberty to see what was produced against them, and had Liberty to examine.

Depositions read in both Causes.
Kelw. 96. *a. b.* 100. *a.*
Hard. 180.
Ant. 25, 73, 233, 229.

Sir

Sir John Churchil, who was of Counsel for the Defendant Thomas, yielded that they could not be read by his Client. But, for my Part, I know no Prejudice to the Defendant, being warned by the Order, and might examine in the second Cause. But the Proposals of compounding the Cause took off all Debates.

Nota; The Defendant Worsley had a subsequent Order, saving all Exceptions, &c.

Prat *against* Taylor.

Privilege.
A Scholar of the University sued, the Chancellor puts in his Claim of Privilege by Writing, disallowed.
Vide ant. 41, 221.
3 *Chanc. Rep.* 38, 21.

THE Bill was to have an Account of several Sums of Money, which the Defendant a Fellow of Exeter College in Oxford, Tutor to the Plaintiff's Son, received towards the necessary Occasions of her Son.

The Chancellor of Oxford, by Instrument in Writing, set forth the Privilege of the University Charters, and Confirmation, &c. by Act of Parliament: And the Defendant was a Scholar, and Resident, and that they had a Court of Equity, and prayed that Taylor might be dismist.

The Lord Keeper did not allow the Claim, and said, that Cognizance of Pleas in Equity could not be granted, though Precedents were shewn of the same Claim allowed in Time of Queen Elizabeth. He asked, if any could be shewn in the Lord Elsemere or Coventry's Time; but none could be shewn. And thereupon disallowed the Claim, saying it must be put in by way of Plea. But withal declared it should not be on Oath, but it should be sufficient to aver the Defendant a Scholar, Resident, &c. without Oath; and so he said it should be in case of Outlawry pleaded, the Defendant should not be put to aver the Plea on Oath, but without Oath.

Outlawry and Privilege pleaded without Oath.

Bluet, *a* Dane, *against* Bampfield *and others*, *Merchants of* Denmark.

Bill dismist by Sentence given against the Plaintiff in the Court at *Denmark*.

TO be relieved against Actions of Trespass, for seising their Goods in the Island of, &c. on the Pretence of breaking an Inhibition of the King of Denmark, whereas by Articles of Alliance, between the Crown of England and

Vide ant. 232.

and Denmark, free Trade was allowed to all English in all Ports of the Kingdom of Denmark, whereof the Island was a Port. But in regard Sentence was given in the Court there for the Plaintiff on the Seizure, the Bill was dismist.

Anonymus. November 5.

Contempt discharged by a general Pardon.
Vide Curs. Chan. 91 to 95, 242, 263, 463.
3 *Chanc. Rep.* 23, 39, 215.
1 *Vern.* 187.

PRocess issued till Proclamation was returned. Then came the General Pardon.

The Defendant appeared and demurred.

The Plaintiff moved to set aside the Demurrer; for tho' the Contempt was pardoned, yet the Delay was no less to the Plaintiff.

The Lord Keeper. As to the Contempt, the Defendant stands rectus in Curia, and consequently all Contempts are likewise pardoned. Therefore proceed on Demurrer.

Anonymus. November 5.

A Rule, that if a second Answer be insufficient, Process shall go on where it was before.
Curs. Canc. 115, 116.

THE Lord Keeper declared for a Rule, That if after Process of Contempt, the Defendant put in an insufficient Answer, and so reported, the Plaintiff should not as formerly begin with Process at the Subpœna, but should go on to the Attachment with Proclamation and other Process, as if the Answer had not been put in.

Vide ant. 66. After four insufficient Answers, the Defendant examined on Interrogatories, and *post.* 279.

Cox *against* Quantock. November 19.

Max. Eq. pag. 16.
A Devise to two Executors of *Resid. bononum*, one of them dies, the Administrator sues the surviving Executor for an Account.
A Devise to two Legatees equal, if it survives.

THE Testator had two Executors, and deviseth to them residuum bonorum, &c. after the Debts and Legacies paid; one of them died, his Administrator sued the surviving Executor to have Moiety of the Surplusage.

The Cause came to a Hearing. The Defendant insisted that the Executors were joint Devisees, and took the Residue as Legatees, not as joint Executors.

The Lord Keeper decreed for the Plaintiff, for in case of Executors the Testator intended an equal Share to his Executors; and by Chief Justice Roll's Advice it was decreed, That where a Devise was to two equally, notwithstanding

ſtanding which Word Equally, the Deviſees were joint; yet the Intention prevents the Survivorſhip.

The Cauſe was diſputed; but to the Diſſatisfaction of the Bar decreed. For where the Intention is ſecret and not declared, the ſecret Intent muſt give way to the legal Intent. And if an Adminiſtrator, then an Adminiſtrator de bonis non muſt have it. 19 November 1674.

2 *Chanc. Caſes* 64. 1 *Chanc. R.* 58, 261. 1 *Vern.* 217, 361, 482. *Winch.* 59. 2 *Chanc. Ca.* 63. 1 *Vern.* 425.

Chalfont *againſt* Okes. November 21.

A Termor Grants the Eſtate in Truſt for himſelf for Life, and after for his Wife for Life, and after to their Child or Children for their Lives, and after to J. S. and whether the Truſt to J. S. were good, the Lord Keeper took Time to adviſe, and now delivered his Opinion that it was good. But if it had been to the Heirs of their Bodies, it had not been a good Truſt after ſuch Limitation to any other. He ſaid that in this and the like Caſes the Chancery altered the Law; for at Common Law 'till Weldon's Caſe in Plowden's Commentaries Judgment was given againſt the Limitation, by Deviſe for a Term to one for Life, the Remainder to another, and ſo over. But the Chancery decreed theſe Limitations good. But if it be in ſuch manner as to make a Perpetuity, that may neither be in Law nor Chancery.

Contingent Remainder of a Term. *Vide ant.* 230, &c. *ibid.*

Perpetuity, *vide ant.* 230, &c. *ibid.* 2 *Chanc. R.* 229, 282.

Negus *againſt* Fettiplace. November 21.

Fettiplace, Tenant for Life of a Rectory in the Right of his Wife, demiſeth the ſame to the Plaintiff for 21 Years, at 100 l. Rent, payable at Lady-day and Michaelmas; a Fortnight before Michaelmas the Wife died; the Tenant ſent to Fettiplace Notice thereof; Fettiplace and the Plaintiff came to an Agreement, on which Negus gave Bond to Fettiplace to pay 80 l. (Michaelmas Rent) to Fettiplace, and Fettiplace agreed to ſave him harmleſs againſt all others for that Rent; and Negus now ſues to be relieved againſt the Bond, becauſe no Rent was due, and no Conſideration for the Bond; and had a Decree againſt the Bond, tho' Mr. Attorney objected, and preſt it, that there was no Fraud, and the whole Truth was known, and it was in foro Conſcientiæ. And the Tenant having

Bond to pay an Agreement, and Agreement to indempnify him, relieved againſt the Bond without Payment. *Ant.* 85, 86, 188, 189, 234.

Hard. 200, 204.

having taken all the Summer Profits, should pay for them, at least in Proportion.

Cary *against* Appleton. November 26.

Paraphernalia. Vide 2 Vern. 83.

1. THE Husband deviseth the Jewels which were Paraphernalia of his Wife, and died. Decreed to the Wife.

2. The Husband devised his Goods to be sold for raising of Portions to be paid to his Daughters at their Ages of eighteen or Marriage, and that the same be raised out of his Rents, Issues and Profits of his Lease Lands, if the Goods were not sufficient, and the rest after Sale and Profits of the Goods and Leases, as aforesaid, to other Uses. One Sister was paid, the other comes of Age, the Goods were not sufficient. The Dispute was, Whether the Leases might be sold? For upon these Cases they are not to be sold; the Rents and Profits are liable.

A Trust to raise out of Profits implies a Sale.

Bertue and *Stile* 28 *Jan.* 27 *Car.* 2. *in Cancel.* 2 *Chan. Ca.* 205.

The Lord Keeper. In the Lord Cornbury's Case it was decreed, That the Devise of Profits gave Power to sell; otherwise if it be of the Annual Profits. A Devise of the Profits is a Devise of the Land; and the Father did as much intend a Provision for his Daughters as for his Son. And I take the Difference where the Devise is of the Profits of a Chattel Lease, and where of Lands, as in this Case. For if he had not directed a Sale, the Leases had been liable to the Portions, and so the affirmative Words shall not bear a negative Sense to exclude the Sale of the Lease Lands.

Bokenham *against* Bokenham. December 4.

Defective Conveyance by Tenant in Tail supplied. *Vide ant.* 104, 160, 161.

EDmund Bokenham, the Plaintiff's Great Grand-father, made a Settlement of divers Lands and Manors, inter al. Stockmash, which Estates descended to Sir Henry his Son, in Tail. Sir Henry in Consideration of a Marriage to be had between Wiseman his Son and Grace Davies, makes a Deed of Feoffment, to the Use of himself for Life, the Remainder to Wiseman for Life, the Remainder to the first, second, and other Sons by Grace. This Deed is indorsed generally (Livery made to J. S. appointed

pointed by Paul Dawes the Feoffee thereto,) The Marriage takes Effect, Wiſeman and Grace have Iſſue Henry Walſingham, Paul the Plaintiff, and Hugh the Defendant, and ſix other Sons. Sir Henry after levies a Fine to Walſingham then his eldeſt Son; and this was to the Uſe of Sir Henry and his Heirs. Walſingham dies, and he conveys the Manor and Seigniory to the Defendant, the fourth Son of Stockmaſh only, and dies. The Defendant enters, ſuppoſing that Livery was not well given, becauſe the Letter of Attorney to take Livery was loſt, as he ſuppoſed.

Letter of Attorney and Livery ſupplied in Equity. *Vide ant.* 104, 160, 161. and the Caſes there cited.

Lord Keeper decreed, 1. That the Letter of Attorney ſhould be ſupplied, and Livery admitted; tho' it was objected, that this was in Effect to decree a Diſcontinuance, which is a Wrong and an unlawful Act, and that it was,

4 *Leon.* 8.
2 *Vent.* 350.
1 *Lev.* 238.
2 *Caſes Chanc.* 30.
Ant. 104, 105.

2d. To aſſiſt a Remainder Man in Tail in a third Remainder (for he was the third Son) againſt a legal Fine of his Father, Tenant in Tail, and whoſe Fine was a Bar to him in Law. And alſo againſt the Acceptance of the Fine by Walſingham, who joined with Sir Henry, who had Power by the Recovery to have barred the Eſtate of the Plaintiff.

But to this laſt the Lord Keeper ſaid, The Grandfather might have the Conveyance made by himſelf in his own Hand; and it is apparently ſo, for he recites in that Deed that he was Tenant in Tail, and he recites not the Feoffment made by himſelf.

Crofts *againſt* Wortley. December 9.

Plea of a former Bill depending, yet anſwer the ſecond Bill.
1 *Vern.* 332.

A former Bill depending was pleaded in Bar of a ſecond: But though both Bills were of the ſame Matter and Effect, the latter had ſome new Matter.

Ordered, That being the Plea was good, the Plaintiff ſhould pay the uſual Coſts of a Plea allowed. But the Defendant to anſwer the ſecond Bill, and the former Bill diſmiſt with 20s. Coſts.

Anonymus.

1. Sequeſtration againſt the Heir.
2. Purchaſers with Power to revoke.
3. Not againſt a voluntary Conveyance. *Poſt.* 345.
* *Vide ant.* 220, 221, 222.

There was a Decree for 5000 l. on Account againſt the Father in Execution, whereof the Proceſs was carried to a * Sequeſtration of the Lands, which the Father had at the Time of the Decree, and ſettled on

Debate on the Heir of the Father, though he also made Title thereto by Conveyance made to the Father.

The Question grew, Whether the Conveyance was revokable, or not? For if it were revokable the Lord Keeper would keep on the Sequestration, though the Decree was not for Lands, but for personal Duty. And on producing several Conveyances, the Case was, That before the Suit, about 1663. the Father settled the Lands voluntarily on himself for Life, the Remainder to his Son, with Remainder over; Provided he might by Deed revoke those Uses; but it was now further insisted, (viz.) there was not express Power to limit other or new Uses, but only to revoke. Afterwards, and before the Decree or Bill, the Father revokes the former Uses, and by the same Deed limits an Estate to his Son; In which second Deed there is no Power of Revocation; but though it was voluntary and for natural Affection, was absolute.

Limitation of *new Uses* good, the express Power being only to revoke. *Vide ant.* 114, 115. *New Eq. Ca.* 11, 12.

The Question was, If the Limitation of new Uses was good, the express Power in the first Deed being only to revoke.

The Lord Keeper declared his Opinion clearly that it was, and therefore discharged the Sequestration.

Where the strict Words of a Power may be inlarged in Equity. 1 *Vern.* 85. 2 *Vern.* 80, 376, 379, 528, 531, 542. 1 *Chan. Rep.* 183, 185, 266, 283. *New Eq. Ca.* 11, 12. *Ant.* 10, 23, 35, 176, 114, 240. *Post.* 264. 2 *Vent.* 350. 2 *Chan. Rep.* 212. 2 *Chan. Ca.* 29, 30, 87, &c.

DE

DE
Term. Sanct. Hill.
Anno Regis 26 & 27 Car. II.
IN
CANCELLARIA.

Sir James Bellingham, *Nephew of Sir* Henry *Son of* Allen Bellingham, *againſt* Elizabeth Lowther, ... Agnes, *Sir* John Wentworth. 14 January 1674.

9 Jac. SIR James, the Grandfather of the Plaintiff, ſettled certain Freehold Lands in Weſtmorland to the Uſe of himſelf for Life, the Remainder to Henry his Son, and the Heirs Males of his Body, the Remainder to Allen his ſecond Son, and the Heirs Males of his Body, the Remainder to his own Heirs; and covenanted to ſettle Copyhold Lands in the ſame Manner; and died 10 Jac. The Freehold was ſettled, but non conſtat the Copyhold were; but Sir Henry ſurrendred to the Uſe of him and his Sequel.

Defective Surrender of Copyhold Lands, *vide ant.* 96, 171. *poſt.* 247, 261. *N. B. New Caſes in Equity* 106.

1649. Sir Henry having ſuffered a Recovery of the Freehold, covenants with Willoughby, &c. to ſettle the Freehold Lands on himſelf for Life, the Remainder of Part to Katharine his Wife for Part of her Jointure, the Remainder to the Heirs Males of himſelf by Katharine; the Remainder to the Heirs Males of his Body, the Remainder to Allen, and the Heirs Males of the Body of Allen, the Remainder to the Heirs of Sir Henry, and covenanted with the ſame Perſons to ſettle the Copy-

hold by Surrender to himself for Life, the Remainder to Katharine in full of her Jointure, the Remainder to the Heirs Males of Sir Henry by Katharine, the Remainder to the Heirs Males of Sir Henry, the Remainder to Allen and the Heirs Males of his Body.

Sir Henry Bellingham coming to make a Surrender of the Copyhold, fell sick by the Way, but made a Letter of Attorney to others to do it; but died before it was done. The Freehold Lands remained to Sir James the Son, and Heir Male of Allen, who now exhibited his Bill against Thomas Lowther and John Wentworth, to whom the Copyhold Lands descended as Heirs general for Want of Surrender. The Scope of this Bill was to have Assurances of the Copyhold, and to be relieved against Actions at Law.

There were divers Matters in the Bill; but this was the Effect and Substance of the Case upon the Plea. And it was said that this Covenant was but voluntary as to Allen, because he was no Party to the Covenant, nor within the Consideration of the Marriage, or Portion. And in case of Sale for Money, if any Sale had been made, it might be fraudulent as to Allen, and yet be good as to Katharine, and the Issues of the Marriage, as it was in Sir John Jacob's Case. And if one make a voluntary Conveyance to a younger Son, the same shall not be made good in Equity against the Heir at Law, if it be a voluntary Conveyance, and defective in Law; and if it had been executed by Surrender in the principal Case, yet Sir Henry might have cut it off by the Recovery.

Voluntary Deed fraudulent as to one, and good as to another.
1 *Vern.* 286.
2 *Ch. Ca.* 120, 136.
1 *Vern.* 167, 133, 150.
2 *Vern.* 7, 35, 239, 473, 511, 693.

The Answer to these Objections endeavoured and offered was. 1. That Sir Henry here expressly intended to preserve the Name and Male of his Family before his Daughters, though they should happen to be his Heirs; for he limits the Estate to his own Heirs Males, and immediately after to Allen, and his Heirs Males, which was likewise done by Sir James his Father, and that was Consideration enough, (viz.) not only his Name, but his Blood as his Brother was; and the Continuance of his Name in his Blood was not only a good Consideration, but such as prevailed with old Sir James and Sir Henry above the Affection of the Heirs general: And the Consideration of the Deeds of Covenant is not only the Marriage of Katharine, but continuing the Lands in his Name and Blood. And the Covenant binds Henry and his Heirs; and though the Covenant be with others, and not with Allen, yet the Covenant is obliging to the Heir, and puts

a Tie and Obligation on Sir Henry and his Heirs, and so differs from a voluntary Conveyance without Execution; for there is no Tie in that Case, no Man at all is bound by it: It is meerly void, and so is not this Covenant. And though it be true, that if the Surrender had been made, and thereby Henry Tenant in Tail, with Remainder to Allen, yet he might by Recovery have barred the Remainder; yet unless he had made some Attempt that way, his Intent and Covenant stands still good, and differs from Worsley's Case, fol. for there was an Act and indeavour to cut it off, but no such here.

Difference between a Covenant to settle Lands and a voluntary Conveyance.
Vide 1 *Vern.* 46, 100, 219, 365, 456, 466.

Lord Keeper. Can the Plaintiffs amend your Case on Proof?

Churchil. They cannot; for we admit the whole Bill.

Lord Keeper. If Sir Henry had had a Son by a former Wife, you could have no Relief against him on this Covenant; which as to the Plaintiff is meerly voluntary, and Matter of Kindness. And if Sir Henry and Allen were both in Life, Allen could not inforce Sir Henry to execute the Covenant; yet Katharine might; for it were vain to decree that to be done by Henry, which Henry might undo the next Day; and so it was resolved in Hockley's Case, the younger Brother goes away with 1500 l. per Annum, and the Heir general has but 200 l. per Annum, Copyhold. And for the Reasons given dismist the Bill, 14 Jan. 1674.

Holloway *against* Collins. February 6.

A Legacy of 125 l. was given to the Plaintiff being but ten Years old, and at that Age was paid to the Plaintiff's Father, who after died insolvent; the Infant, at full Age, sued the Executor of the Devisor for the 125 l.

A Child's Legacy paid to the Father, who failed; the Payment decreed.
Post. 249.
2 *Chan. Cas.* 4, 117, 132.
2 *Salk.* 416.

The Lord Keeper held it good Payment: But was prest very much by the Attorney General of the ill Consequence; for the Law must be the same if it were 1000 l. and extends to other Cases of like Nature, not to Legacies only.

Lord Keeper. What should the Executors do?

Attorney General. Have taken Security to repay it to the Infant, or sued here to have it paid.

Lord Keeper. It may be so where a Legacy will bear the Charge of Suit, but not else, and delivered his Opinion accordingly. But the Defendant being put to prove the Payment

Payment, did prove likewise that the Executor took a Bond, which the Court prest the Defendant to shew. Whereupon the Solicitor in the Cause said he had it not, but would produce it by the next Day. But said it was a Bond to the Executor to save him harmless.

Lord Keeper. Then he paid on the Security at his own Peril.

Churchil desired Time to shew the Bond till the next Day; for we may not trust the Judgment of the Solicitor what the same is. It may be it is to pay to the Infant at his full Age.

Lord Keeper. I shall believe the worst, unless you shew the Bond; therefore decreed the Executor to pay it.

Hole *against* Harrison. Febr. 17. *Et econtra.*

Three bound in a Recognizance, one is sued and paid the Whole, another is insolvent, the Third is sued for Contribution, he shall contribute a Moiety and not a third Part.
See 1 *Vern.* 70, 404, 440, 297.

HOLE, Harrison and S. were bound in a Recognizance to the Chamberlain of London. The Plaintiff Harrison was sued thereon, and paid the whole Money, and now sued Hole, who was bound with him for Contribution. Hole, Harrison and S. being all bound, and J. H. was dead insolvent, and S. was run away. The Question was in what Proportion the Contribution should be, (viz.) of a Third or Moiety? Decreed a Moiety, for S. is insolvent.

Sir ..... Holland *and his Wife against* Blandy. February 17.

The Lord's Widow decreed to be endowed of the third Part of Copyholds, *&c.* but reversed as to that.
1 *Vern.* 179, 294, 356.

THE Wife endowable of two Manors in Surry and Stratton in the County of Wilts, which consisted of Copyholds, is endowed by Indenture of the Heirs of the Manors in the County of Surry, and by parol Agreement was to have a third Part of the Rents and Profits of Stratton; and the Rents were accordingly paid to her in Proportion, for thirty Years and more. The Copyholders purchase the Inheritance of their respective Copyholds in 1647. and shall pay their Rents in Proportion; during the ancient Lives of the Copyholders they purchased for Money; the Lives being dead on which the Copyholds depended, the Plaintiff sued for the third Part of the improved Value. The Defendants pretend that they had no Notice of the

Agreement, and being Purchasers without Notice were not to be obliged thereby.

Purchaser without Notice. *Vide infra & ant.* 36, &c.

The Plaintiffs insist that they had Notice, and so the Payment of the Proportion of the Rents proved, and it was publickly notified at the Courts of the Manor, and divers of the Tenants had Abatement in their Purchase, though the Defendants denyed they had any.

At the Rolls the Plaintiff had a Decree for the Rents and Improvements.

The Lord Keeper on Appeal reversed the Decree as to the improved Values, and confirmed it as to the Rents, and left the Plaintiffs to take their Course for their Fines, for which there was an Agreement; but as he said there was none for the third Part of the improved Values. And it was then prest the Defendant must have paid Fines, if they had not purchased the Fee, and by their Purchase the Plaintiff, who but for this Agreement could have had Dower of the Lands, the Copyhold being determined, and the Act of the Copyholders shall not keep the Plaintiff from Dower and hinder her from Fines. And therefore it was prayed that some Course might be taken in that.

Act of the Copyholder not to hinder the Lord's Wife of Dower. See 1 *Vern.* 118, 166, 294.

The Lord Keeper. I leave you to your Course.

Jacob *against* Thatcher. February 17.

Purchaser without Notice not protected. How far a Purchaser is favoured in Equity, *vide* 1 *Vern.* 52, 136, 286, 465, 467. 2 *Vern.* 255, 281, 327, 701. *Ant.* 36, 37, 39.

The Plaintiff had a Jointure made by her Husband of Lands subject to a Judgment, which Thatcher purchased in, and did extend the Judgment, and took a Lease from the Husband, who dyed.

Decreed that Thatcher shall not hold over by the Lease, since the Profits taken after the Extent were enough to satisfy the Judgment according to the true Value, nor shall hold over by the Extent after the extended Value to protect his Lease, altho' in Truth he did purchase the Lease for valuable Consideration, tho' also he had taken a Lease first and for valuable Consideration, and without Notice of the Jointure, and then had bought in and extended the Judgment, he might protect his Lease thereof. But Sir John Jacob and he (viz.) Thatcher, when the Extent is laid on, and in a Way of Satisfaction by the true Value, shall not turn the Debt on the Jointress. The Extent it seems was returned and filed, but Thatcher entred not but by a Lease subsequent.

Hixon

Hixon *againſt* Wytham.

Where Lands are deviſed for Payment of Debts and Legacies, both to be paid equally (except ſuch Debts as charge Lands). For Equality is Equity. Vide Max. Eq. 13, 14.
2 Chan. Ca. 54.
1 Vern. 63, 94.
Ant. 14, 32, 136.
2 Ventr. 360.
Poſt. 275, 257.

CLement Wytham ſeized in Fee, made a Writing in this Form, This Indenture made the Day of, *&c.* between *Clement Wytham* of, *&c.* of the one Part, and *James Orbel* of, *&c. William Skinner* of, *&c.* of the other Part: Whereas there are divers Debts owing to *Clement Wytham*, and having an Intention not only to raiſe Portions for his younger Children, but alſo to raiſe Money for the Payment of his Debts, altho' his Perſonal Eſtate came not in: Now the ſaid *Clement Wytham* in Conſideration of 5 l. doth grant, bargain and ſell to the ſaid *James Orbel* and *William Skinner* all thoſe Lands, *&c.* mentioning the Lands, but not Eſtate, on Truſt to ſell after his Deceaſe, the Money raiſed by Sale to be imployed as follows, and named divers Perſons to receive ſeveral Sums, and the reſt of my ſaid Money, and my Plate, and other my Perſonal Eſtate of me the ſaid *Clement*, (and here in this Part changeth the Perſon, and ſpeaks in the firſt and not in the third Perſon) I give and bequeath in Manner following, and appoints to ſeveral Perſons ſeveral Sums, and then addeth, I hereby name the ſaid *James Orbel* and *William Skinner* my Executors to the Uſes aforeſaid.

1ſt. It was queſtioned, whether this was a Will or not, being made in the Form of an Indenture, and as above: But the Defendants deſerted that Point, and yielded that it was a Will, and the Lord Keeper accordingly.

Lands deviſed for Payment of Legacies, made ſubject to Debts.
Vide ant. 14, 136, 137.
Poſt. 249, 251, 253.

2d. The Plaintiffs are Creditors of Clement the Teſtator, and ſued to be ſatisfied out of the Truſt, they not being named, and on his Sale, if the particular Legatees be paid, little or nothing will be kept; and there is no Clauſe in the Will that his Debts ſhould be paid: But on the other Side, the Words having an Intention not only to provide Portions, &c. but alſo to pay his Debts, &c. and making his Executors to the Uſe aforeſaid, refer to the Whole.

The Lord Keeper pronounced this Decree, That the Plaintiffs the Creditors ſhould be paid before the Legacies, and not only in Proportion, but before them; for a Man may not give but what is his own; but what he hath ultra æs alienum. Therefore the Legacies ſhall come into the Truſt after the Debts. But a Debt without Specialty, is as-

much as a Debt Jure naturali, and in Conſcience as a Debt by Specialty; and therefore there ſhall be an Equality with Debts by Specialty, where Conſcience is the Judge. But the Lord Keeper being urged, that the Precedents of the Court had been otherwiſe, (viz.) that when Lands are to be ſold for Payment of Debts and Legacies by Truſtees, the Legacies were in equal Degree with Debts, unleſs it were ſuch Debts as charged the Lands; and the Reaſon is, becauſe only the Will of the Owner makes the Land liable, and gives no Preferment to the one before the other. Thereupon the Lord Keeper gave Time to preſent Precedents to him.

Debts on ſimple Contract to be paid in Proportion with Debts by Specialty where Lands are deviſed, &c.

Leech *againſt* Leech. February 27.

THE Bill was by Truſtees to guide and direct them in divers Truſts, and to protect them in executing the ſame, which the Court now did, (viz.) the Father made a Leaſe in Truſt with Reference to his Will, and thereby deviſed to ſeveral of his Daughters 500 l. to each, to be paid at One and twenty Years or Marriage; and if any or all died before, then to others. The Daughters had no other Portion, nor no Maintenance; and Direction was prayed by the Truſtees, whether they might allow the Daughters Maintenance.

Where there is a Deviſe over of the Portion, the Court can allow no Maintenance out of it; otherwiſe, if no Deviſe over.
Vide ant. 245.
2 *Vern.* 431.
1 *Vern.* 255, 324, 326, 335, 462.

The Lord Keeper. No: Becauſe of the Deviſe over; elſe it might have been done.

2. The Father Tenant pur auter vie made a Leaſe for ninety-nine Years, as was pretended, but was to A. and B. and their Heirs habendum for ninety-nine Years; which Mr. Attorney preſt was void, and then the Truſt annexed to the Leaſe is void.

If a Truſt be for Payment of Debts, it may ſupport a Conveyance, otherwiſe void.
Ant. 248.
Poſt. 251, 253.

The Lord Keeper. The Truſt is for Payment of Debts, and that ſhall ſupport the Truſt.

3. A Truſt for Payment of Debts generally is good againſt an Heir, though no Creditor be Party to the Deed, nor Debt expreſſed in particular, nor Covenant in the Leaſe to pay.

Truſt for Payment of Debts generally good againſt an Heir, tho' no Creditor Party. But not ſo againſt a Purchaſer.
See 1 *Vern.* 65, 69, 293.

But the Lord Keeper ſaid, he would not maintain it againſt a Purchaſer.

Whorewood *againſt* Whorewood. Febr. 22.

Max. Eq. 7. *Rep. Chan.* 1 *Part* 223.

A Decree for Alimony *quouſque* Cohabitation.

The Husband exhibits a Bill, and offers to cohabit.

1 *Vern.* 53, 143, 204, 244, 245, 326. 2 *Vern.* 386, 493, 671, 752.

Note; This was in a Time of the Commiſſioners who had this Juriſdiction eſpecially given.

IN the late Times of the great Troubles, the Commiſſioners of the Great Seal, as they were then called, had Juriſdiction given them in the Caſe of Alimony between Mr. Whorewood and his Wife. A Decree was made that Mr. Whorewood ſhould pay 300 l. per Annum to his Wife till they cohabited, and during their Separation, and Aſſurances to be made for Payment thereof, with Condition to be void in caſe of Reconciliation and Cohabitation; but the Aſſurances were made without theſe Conditions. Mr. Whorewood for ſix Years paid not the 300 l. per Annum, the Decree was confirmed by the general Act touching judicial Proceedings. Mr. Whorewood did not reſt there, but exhibited a Bill of Review; and thereon the Decree affirmed, for the Bill was diſmiſt. Further Struggling was by Mr. Whorewood, and References; and now he exhibits this Bill that the 300 l. per Annum might ceaſe, becauſe he offered to be reconciled, and deſired to cohabit with her, and uſe her as his Wife.

The Lord Keeper was aſſiſted now by Chief Juſtice North and Juſtice Rainsford.

On the Defendant's Part it was ſaid, that the Act being made when there was a Suſpenſion of Eccleſiaſtical Juriſdictions, the ſame was conferred to the Commiſſioners, who were to act according to the Laws Eccleſiaſtick, and ſo ought this Court now to do; and it cannot be conceived when there is a Separation and Allowance of Alimony quouſque, &c. that a ſingle Declaration of the Husband, without Conſent of the Wife, ſhould free him from Alimony; for then he might ſo declare and avoid the Sentence the next Day: But it muſt be by her Conſent, or on clear Proof that it is meer Wilfulneſs in her, and that the Fear ſhe had was juſtly removed, which in this Caſe appears by her Oath not to be. And ſhe had great Cauſe to be in Fear by ſixteen Years ſtruggling againſt the Sentence, and his Exaſperation by her Proſecution of him; and the Diſmiſſion of his Bill of Review had now foreclosed him to ſue for Relief by way of Original Bill: And the Decree is for 300 l. per Annum till Cohabitation by Conſent; which Cohabitation muſt be by mutual Conſent.

Resolved 1st. That though the Assurances were absolute without the Conditions or Limitations quousque, &c. yet the Deeds being in Performance of the Decree (for so it was expressed in the Deeds) yet they should be ruled and guided by the Decree.

Absolute Conveyances guided by Decree that directed them.

2. That an Original Bill was proper in this Case, notwithstanding the Bill of Review dismist (viz.) the Court is invested with the same Jurisdiction which the Ecclesiastical Court had, and when a Decree is temporary and for special Ends, an Original Bill lieth to put a Period to it, and to shew the Purposes of the Decree satisfied.

Where a Decree is temporary or for special Ends, an original Bill lies to put a Period to it.

3. That the Court could not discharge the Arrears.

Justice Rainsford was of Opinion, That neither the Wilfulness of the Wife, nor Pretences of Kindness, or Desires of Co-habitation should prevail either way, and therefore that a Trial should be made, and she to be ordered to cohabit for Half a Year or the like, to see what would be; and the Decree of Alimony to be suspended, and after ordered or suspended, as there should be Occasion.

The Decree to pay 'till cohabit, and now the Husband offers to cohabit, the Court can not in this Case discharge Arrears.

North. The Decree hath no Force but from the Consent of the Parties, else the Ecclesiastical Court could not decree Alimony, as this Case is; for if they had decreed a Separation, then they might also decree Alimony, but not Alimony alone saving pro expensis litis. But here is no Sentence of Separation, and therefore the Husband in this Case may sue his Wife ad obsequia debita in the Ecclesiastical Court, or sue those that detained his Wife at the Common Law, notwithstanding the Decree here.

No Alimony can be decreed, but by Consent, unless first a Decree for Separation.
2 *Vern.* 386, 493, 671, 752.
1 *Vern.* 204, 244, 245, 326 and 53.

The Lord Keeper. I cannot decree a Separation. I shall not continue the Alimony to the Wife, if she will not cohabit, nor decree the Wife to cohabit; but shall not discharge the Alimony or Sentence, but keep it in Suspence. But the Wife shall return to her Husband, who shall maintain and use her as a Gentleman and a good Husband ought to do; wherein if he fails, I will hear the Wife's Complaint with favour, and lay on the Decree again, as Cause shall be; but now suspend it, saving to her the Arrears. But she shall immediately return; and if not, she shall have no Benefit of the Alimony 'till she do so, but take her Remedy in the Court Ecclesiastical.

Erſwick *againſt* Bond. February 22.

A Covenant to ſecure the Purchaſer by other Lands not decreed. *Vide poſt.* 259, 274, 287.

ERſwick and his Wife ſeized in the Right of his Wife, conveyed the Lands to the Uſe of himſelf for Life, with Power to make Leaſes, and ſold the Lands; and to ſecure the Purchaſer againſt ſuch Leaſes as might have been made, took a Covenant againſt the Vendor that within two Years he would convey other Lands to that Intent; the two Years being paſt, and no collateral Aſſurance made, next Term after the two Years expired, the Purchaſer exhibits his Bill to have collateral Security according to the Covenant.

Diverſity between Covenants for further Aſſurance and collateral Security. 1 *Vern.* 189.

The Lord Keeper diſmiſt the Bill, and takes a Difference between Covenants for further Aſſurance of the Lands ſold and collateral Security of other Lands to incumber the Eſtate; and the two Years being elapſed, diſmiſt the Bill; Ex relatione Sir John Churchill of the Plaintiff's ſide.

Williams *againſt* Williams. February 23.

A new Bill after Diſmiſſion on Hearing on Suggeſtion of Notice, which was not in Iſſue in the former Cauſe. *Vide ant.* 228.

A Former Bill was exhibited, thereby to ſet up an Agreement to charge the Defendant's Lands. To which the Defendant ſet forth that he was a Purchaſer for valuable Conſideration; and Iſſue being joined thereon, the Defendant proved his Caſe, and the Bill was diſmiſt; and now a new Bill on the ſame Equity was exhibited; but now charges the Defendant that at the Time of his Purchaſe he had Notice of the Plaintiff's Equity (viz.) an Agreement, &c it not being charged in the former Bill, and that the Defendant had Notice, nor by the Defendant ſet forth that he had no Notice, nor Examination to that Point. The Proceedings in the former Cauſe were pleaded in Bar; for this Courſe will make Suits endleſs, and no Man will charge Notice in the like Caſe, but try upon one Point firſt, (viz.) Purchaſer or no: But the Plaintiff ſhould before Hearing have exhibited the Bill he doth now, but now it is too late.

Notice not denied, yet in Iſſue and not proved after Hearing, may have Defendant's Oath on a new Bill.

The Lord Keeper over-ruled the Plea, with this further Declaration, that the Defendant's Anſwer ſhould not conclude the Plaintiff; but tho' he denied Notice, yet

the Plaintiff should examine thereto. He said also that in case Examination should be made of Notice, and no Proof of it, if the Notice had been denied in the former Suit, yet the Plaintiff's Bill to have the Defendant's Oath would lie, but then the Defendant's Oath should not be conclusive.

Maynard *against* Moseley.

Heir at Law by Marriage Agreement becoming a Purchaser in Equity, not liable to his Ancestors Debts. *Vide post.* 255.

SIR Edward Moseley conveyed Lands to the Use of Thomas Leigh, Esq; &c. and their Heirs, on Trust to raise 3000 l. for Mary (his only Daughter); and if he should have more than one Daughter, then 2000 l. a-piece. He had Anne a second Daughter, and died: Anne died young and intestate, Sir Edward, Brother of Anne and Mary surviving Anne; afterwards Mary marrying unto Joseph Maynard, Edward the Brother gave 5000 l. with her, and 7000 l. more he agreed to pay on Contingencies: Joseph releaseth to Edward the Brother all the Demands and Portions which he may claim in Right of his Wife, except the 5000 l. and 7000 l. and other Particulars. Young Sir Edward dies without Issue, and devises his Lands to Moseley the Defendant, and by such Death of Sir Edward the 7000 l. grew due. Mary takes Administration of her Sister Anne, and sues for the 2000 l. and also the 4000 l. There were other Circumstances of the Agreement by Sir John Maynard, Father of Joseph, which induced the Court to dismiss the Bill as to the 4000 l. for the Lease for fifteen Years, whereout the 4000 l. secured was in Joseph Maynard in Right of his Wife; but as to the 2000 l. my Lord Chief Justice Hales and Vaughan agreed that it belong'd to Mary as Administratrix, and the Agreement did not discharge it; for if a Stranger had taken Administration, he should not be barred, &c.

The Lord Keeper gave Reasons for his differing in Opinion from the Judges, but decreed the 2000 l. according to the Opinion of the Judges.

This was a Bill of Review brought by Joseph and Mary, against a Decree made by the Lord Keeper Bridgman; and to which Bill of Review Moseley demurred, and his Demurrer over-ruled by the Lord Chancellor the Earl of Shaftsbury, who was assisted by Judges. The Cause was heard ab integro by the Lord Finch, assisted by the two Chief Justices, ut supra, and decreed ut supra.

Another

Another Part of the Caſe was decreed againſt Joſeph Maynard and his Wife, and was (viz.) Articles of Agreement were made between Sir Edw. Moſeley and his Wife, Thomas Leigh, &c. Friends of Sir Edw. Moſeley, one for him, the other two Truſtees for the Lady, by which on Sir Edward's Part, and on his Behalf ſome Lands in Lincolnſhire were to be ſold for Payment of his Debts, and Annuities to be paid the Lady for Maintenance of her Children, and 400 l. per Ann. to the Lady for her ſeparate Maintenance and Jointure, of 5000 l. per Ann. out of ſeveral of the Lands for the Jointure of the Lady after Sir Edw. Moſeley's Death, and the Lady being ſeized in Fee of the Lands of 300 l. per Ann. in Derbyſhire. It was agreed that the ſame ſhould be ſettled, and that after her Death it ſhould remain or deſcend to the ſaid Sir Edward, and the Iſſue between him and his Lady begotten, and to be begotten; the Remainder to the Lady and her Heirs, in ſuch ſort as ſhe ſhall not have Power to alien from his and her Iſſue.

And after within the Year an Indenture was made and ſealed by Sir Edward and the Lady, and his Truſtees; whereby it was agreed, that Fines ſhould be levied of all the Premiſſes, and the Uſe for ſole ſeparate Maintenance, Annuities and Portions for Children and Jointure, appointed according to the ſaid Articles; and for the Derbyſhire Lands the Uſe was to be to Sir Edward for his Life, Remainder to the Lady for her Life, Remainder to Sir Edw. the Son for Life, with Remainders to the firſt, ſecond, third, &c. and other Sons of Edward the Son, and the Heirs Males of their Bodies; Remainder to the Daughters of Sir Edward and his Lady in Tail.

Afterwards croſs Suits aroſe in Chancery, the Ladies Truſtees, Plaintiffs on the Lady's Behalf againſt Sir Edward, and Sir Edward Plaintiff againſt them, in which the Annuites and ſeparate Maintenance are decreed, and that Fines ſhould be levied according to the Articles and ſubſequent Deeds, and inrolled; but though the Lady had formerly joined in Fines, as well of the Manchaſter Lands, out of which the ſeparate Maintenance as to 100 l. Part thereof was ſettled, as to the Lands to be ſold for Debts, no Fine was levied by the Lady of the Derbyſhire Lands, nor of the Staffordſhire Jointure Lands by Sir Edward; but after the Decree, the ſeparate Maintenance and Annuities were paid while Sir Edward lived, ſaving about 200 l. of the Annuities which were arrear at his Death. And whereas no par-

ticular Lands were appointed by the first Articles for a Jointure, by the next Deed Manchester 100 l. per Ann. and the Staffordshire Lands were limited to the Lady for her Jointure.

Sir Edward being dead, the Lady entred into the Staffordshire Lands and Manchester Rents, and held them whilst she lived, and received the Arrears of the Annuities.

After her Death Sir Edward Moseley, Son and Heir of Sir Edward, and the Lady, were sued by the Creditors of the Lady, to whom she had bound her and her Heirs in Bonds to discover Assets of his Mother's Estate, particularly the Derbyshire Lands.

To which by Answer he set forth the Agreements, Deeds and Decree, and that thereby he was a Purchaser in Equity for his Life, with Remainder, &c. and not liable to the Debts of his Mother as her Heir; and the Creditors proceeded no further. After which Sir Edward, the Son, mortgaged those Derbyshire Lands, and after devised them inter alia to Edward Moseley the Defendant.

Heir at Law by Marriage - Agreement became a Purchaser in Equity, and not liable to pay Debts of his Ancestor.
Ant. 236.
Post. 294.
1 *Chan. Cases* 8, 18, 156, 164.
2 *Chanc. Cas.* 296, 397, 400.
New Equity Cases 32, 62, 122.

Joseph Maynard and his Wife were Plaintiffs for the Derbyshire Lands, Anne the Sister being dead without Issue; and prayed to have Recompence for the Alienation against Edward Moseley, Devisee, the Executor of Sir Edward Moseley the younger, upon the Equity. But altho' the Lady was not bound by her Agreement made during Coverture, yet when after the Death of her Husband, she received the Arrears according to the Agreements and Decree, and enjoyed the Staffordshire Jointure according to the last Deed, she was now bound by what she did being a Widow; and Sir Edward survived, having on his Oath claimed those Grounds as Purchaser, and not as Heir to his Mother, and thereby freed himself from the Debts of his Mother; he might not, if he had been sued by his Sister, have claimed other Estate; and consequently his Trustee could not, and therefore the Sister ought to have the Power to and in the Deed, and Satisfaction for what it should cost her to redeem, he having devised his Lands for Satisfaction of his Debts, Legacies and Engagements. But the Bill of the Sister was dismist by the Lord Chancellor Finch, Hales and Vaughan Chief Justices concurring. It was on Construction of the first Articles.

Feme, though not bound by her Agreement during Coverture, yet acting according to the Agreement when a Widow, is bound by it.
Post. 265, 266.

Note; A voluntary Settlement on the Wife shall not bind the Heir in Equity. 2 *Chanc. Cases* 69. *Vide ibid.* 1, 4.

Papilion *againſt* Hix.

On a Plea.

The Tinners article to deliver Tin to the Merchant Cuſtom-free; after Delivery it is ſeiſed for Cuſtom, and the Merchant ſues to be relieved, but is not, for it is *in fraudem Regis*.
Vide ant. 27, 30, 37.

HIX, a Tinner in Cornwal, articled with Papilion to ſell and deliver to him ſixteen Tun of Tin free from all Cuſtoms and Duties, Part of the Price paid, the reſt ſecured to be paid. Hix, after the Tin was ſeiſed, for that the Coinage had not been paid, which by the Cuſtom of the Stannaries is a Forfeiture, in caſe that the Tin be ſold before Coinage paid or ſecured; and becauſe the Forfeiture was by Hix, Papilion ſued him to be relieved, he having covenanted to deliver it Cuſtom-free.

The Lord Chancellor diſmiſt the Bill, ſaying, I will break this Trade between the Tinners and the Merchants; for by this Trade the King is cozened, and the Coinage Duty ſeldom anſwered. The Tinner pays no Duty, ſelling to the Merchant in ſmall Ingots; and if it chance to be taken, he affirms he did firſt pay the Coinage, and then puts it into ſmall Pieces eaſy to hide and tranſport; And if he be ſpied, pretends he coined it, having firſt coined two or three Slabs, and all the Reſt he tranſports and ſells in little Pieces by Colour of coining one or two Slabs. I will break this Trade.

The Lord Keeper Finch.

Chamberlain *againſt* Chamberlain *and others*.

Truſtee of a Term after Aſſent of the Executor, ſells it *bona fide*. *Qu.* If good againſt Creditors.
See 2 *Vernon* 248, 249, 257.
Ant. 16, 136, 7.

THE Caſe was, That Tho. Chamberlain, Eſq; being poſſeſſed of Leaſes of 3000 l. yearly, and owing ſeveral great Debts, made his Will, and made his Wife Elizabeth his Executrix, who proved the Will, and paid the Debt as far as the Chattels Perſonal or Stock would reach, but no farther: And there being yet Debts unpaid above the Value of the Leaſes, ſhe aſſents to a Bequeſt of the ſaid Leaſes made by the ſaid John Chamberlain in his ſaid Will, (viz.) to the ſaid Elizabeth for her Life, and after to John Chamberlain the eldeſt Son of the ſaid John Chamberlain for his Life, and after to the firſt Son of the

ſaid John Chamberlain the Son, and the Heirs Males of the firſt Son; after which Aſſent Eliz. dies, and leaves Mr. Croft her Executor, who came to article with the Plaintiff to ſell the ſaid Leaſes to the Plaintiff for 900 l. whereupon the Plaintiff exhibits his Bill againſt the Defendant John Chamberlain the Son, and Tho. Chamberlain, the firſt Son of the ſaid John Chamberlain the Son, and Mr. Croft the Executor. And now the Queſtion was, Whether Debts being unpaid at the Time of the ſaid Aſſent, and nothing liable to make good the ſaid Debts ſaving the ſaid Leaſes, the Leaſes might be Aſſets in the Hands of Mr. Croft; ſo that he might ſell them to anſwer the ſaid Debts, notwithſtanding the ſaid Aſſent; or whether the ſaid Bequeſt of the Leaſes were veſted in the Remainder, according to the ſaid Deviſe by the Aſſent, and could not be deveſted by the Sale of Croft the Executor.

Truſt of a Term is no Aſſets; *contra* of a Fee. See 2 *Vern.* 248. *Ant.* 14, 128, 148, 226.

And now the Lord Keeper declared and decreed Croft to convey according to his ſaid Articles to the Plaintiff, and that the ſaid Leaſes ſhould be Aſſets notwithſtanding the Aſſent. And firſt he relied on this Rule of Court, That an Executor ſhall not be forced to pay Legatees until the Legatees ſhall give Bond to refund in Proportion, or in the Whole, for the Satisfaction of Debts, if any do appear unſatisfied. Yet the Legatee upon his Bill in the Court ſhall refund, and this as well as where it is Legative in ſpecie, as a Horſe, or 1000 l. actually paid; for the Legacies are not due till the Debts be paid, and a Legacy being paid, remains as a Legacy in the Hands of a Legatee after Payment: And hence it is that a Legacy is not attachable by foreign Attachment, being it may work a Wrong to the Creditors, who are third Perſons, and can have no Day in Court in that Suit to interplead. And for this Reaſon, if an Infant Executor aſſent, it is no good Aſſent, if there be not other Aſſets for Debts, which the Common Law provides for the Security of Creditors; much more ſhall this Court provide for their Security: But if after ſuch Aſſent, John Chamberlain, the Son, had ſold the Leaſes to a third Perſon bona fide, this had defeated the Creditors; for he had a good Title in Law, and the Purchaſer ſhould not be prejudiced by this Truſt for the Creditors. And in this Caſe it was alſo ruled, that if an Executor make a Devaſtavit, and die, his Executor is liable to make good of the quantum of the Devaſtavit to the Creditors, if he hath Aſſets from the firſt Executor.

Leaſes are Aſſets to pay Debts, notwithſtanding the Aſſent of the Executor to the Deviſe of them. *Vide ant.* 14, 16.

Legatees ſhall give Bond to refund in caſe of dormant Debts ariſing. *Ant.* 149.

The Nature of a Legacy.

Legacy not attachable by foreign Attachment.

Infant Executor aſſents to a Legacy. See 2 *Vent.* 360. *Max. Eq. p.* 12. 1 *Vern.* 455. *Ant.* 136.

Executor of an Executor liable to a *Devaſtavit* made by the firſt Executor. *Poſt.* 303.

Note; A Case was cited, wherein it appeared that the Spiritual Court insisted to have Security to answer Debts before the Executor should pay the Legacy; and a Prohibition was prayed, but denied. And in this Case because it appeared that the Defendant Thomas Chamberlain was not born at the Time of the Decease of the said John Chamberlain the Grandfather, nothing could vest in the said Infant, and therefore the whole Terms remained in the said Defendant John Chamberlain; and for this Reason the Bill against the Infant was dismiss.

Anonymus.

Mortgagee Forfeit shall have Interest for his Interest.

NOTE; This Hillary Vacation, a little before Michaelmas Term, the Lord Keeper declared it should be the Rule, That a Mortgagee of a Mortgage Forfeit should have Interest for his Interest, and should be only accountable for what Profits he should receive, and not for what he might have received, unless there were Fraud.

Mortgagee assigning, the Assignee shall have Interest for the Interest then due.

And note; That it was always the Rule, That the Mortgagee assigning, the Assignee should have Interest for the Interest then due; and never was contradicted but in Porter and Hobart's Case, in the Time of the Lord Shaftsbury.

Plea of *Outlawry* put in without Oath.
Identities.
Vide ant. 3.

Note; The Lord Keeper ruled that a Plea of Outlawry should be put in without Oath, because of the Averments of the Identities of Persons; and ruled that a Plea of the Privilege of Oxford should be put in without Oath, between Masters and Bush, 24 October last.

Touching Pleas of Outlawry in Equity, *vide Curs. Canc.* 1 *Vern.* 185. 2 *Vern.* 37, 198.
Touching Payment of Interest on Mortgages and other Securities, *vide ant.* 29. and the Cases there cited.

DE
Termino Paſchæ,
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Tanner, *alias* Davis, *againſt* Florence. April 19.

SIR Hugh Smith Grandfather to the Defendant and H. S. 21 Jac. made a Leaſe by Indenture to Arthur Tanner for ninety-nine Years, if Arthur, Elizabeth, and Thomas their Son, or either of them ſhould ſo long live. In which was a Covenant from him and his Heirs, That if Thomas died, leaving Arthur and Elizabeth to make a new Leaſe for Yeaes, if ſhe and Mary her Daughter ſhould ſo long live, and tenders the 20l. and ſurrenders the old Leaſe, and dieth, the ſaid Mary, Adminiſtratix of Arthur Tanner, being married to Davis, they ſue the Defendant for a new Leaſe, charging that they had Notice of the Leaſe, 21 Jac. and Covenant.

The Defendant (viz.) Florence makes Title as Jointureſs by Conveyance made by the ſaid Sir Hugh for valuable Conſideration, and of Marriage to be had between Florence and William, Son of Sir Hugh, of the Manor of Aſhbourn, whereof the Lands in queſtion are parcel; in which there is a Covenant againſt Incumbrances, except Leaſes or Copies determinable on three Lives, and on the ſaid William and Florence, and the Heirs of William by Florence. And the Defendants deny Notice of the Leaſe ſet forth by the Plaintiff, or of the Covenant, but believe there

Of Covenants, &c. that bind the Land or the Perſon. *Vide poſt.* 274. *Ant.* 252. 1 *Vern.* 48, 110, 201, 472, 363.

there was no ſuch Leaſe or Covenant, becauſe they have a Counterpart of a Leaſe of the ſame Land to the ſame Arthur Tanner for ninety-nine Years, and determinable on the ſame Lives under the ſame Rent. In which Counterpart there is no ſuch Covenant to renew, and other Counterpart the Defendant never had.

The Land bound by Covenant.

This Caſe was heard by the Maſter of the Rolls, who decreed the Jointureſs, and the Defendant Sir Hugh, Heir to the Intail, to make the Leaſe. From which the Defendants appealed to the Lord Keeper, who heard the Cauſe this 19th Day of April, and affirmed the Decree.

Exception of Leaſes for three Lives: In one of thoſe there is a Covenant to renew, paying 20 *l.* It is Notice implied, for they ought to ſee the Covenants. *Vide poſt.* 291.

For it was ſaid, that it was a real Covenant that bound the Aſſignee at Common Law; which the Lord Keeper alſo affirmed. But was much denied by the Counſel of the Appellant, for the Caſe of a Covenant to repair is nothing like, for there it concerns the Land during the old Leaſe in Being, this a new Leaſe.

Lord Keeper. The Exception of Leaſes, ut ſupra, gave notice of former Leaſes, and therefore you muſt take notice of the Covenants in them.

It was anſwered thereto, that the Exception is a Generality, not Particular of this Leaſe, and is but for three Lives; but this in Effect is for four Lives. And it might as well be good for five or ſix Lives, or of the Inheritance; and the Courſe in Purchaſes is to take ſuch general Covenants; as in this Caſe when a Manor is ſold, it is not uſual to peruſe all Counterparts; and many Times they are wanting, and then it will make it very difficult to ſell a Manor in the Weſt Country. And if the Appellants are Purchaſers without Notice, the former Leaſes may anſwer for that, &c. Lord Keeper decreed it.

DE
Term. Sanct. Trin.
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Anonymus. July 11.

THE Plaintiff Executor for Children was to purchase Lands for them, and treated with the Defendant, who affirmed that the Lands were 250l. per Ann. Value, and offered to take a Lease at that Rate for fourteen Years, and did take it, and secured the Rent by Lands of Lives, worth 60l. per Ann. but paid not the Rent for five Years. Whereupon a Re-entry was made according to a Condition in the Lease. And the Lands so entred into possessed for divers Years. The Vendor could have no Relief against the collateral Security, unless Payment were of the Arrears of the 250l. per Ann. due before the Re-entry as well as after the Re-entry. The Lands sold being worth but 160l. per Ann.

Vendor of Lands takes a Lease of them at such a Rent, with Condition of Re-entry, and gives collateral Security for the Payment of the Rent, and a Re-entry.

Vendor could have no Relief against the collateral Security without Payment of the Arrears.

Dowdswel *against* Dowdswel. June 15.

THE Bill was to have certain Surrenders made, but not ingrossed, to be made up and ingrossed. The Plaintiff and Defendant were Brothers; and in this Case agreed by the Lord Keeper, that the Father being Lord of the Manor could not declare the Trusts of Copyholds granted to his Son, though he took the Profits always by their Consent. Eadem die decreed between Holford & .....

Lord of the Manor cannot declare a Trust of Copyholds granted to his Son.

Wright

Wright *againſt* Coxon. June 17.

Plea of Account ſtated, over-ruled though the Defendant but an Executor, and the Account ſtated by the Teſtator.
See and Note the Caſe of the Dutcheſs of *Marlborough* and Sir *J. Vanbrugh*. *New Caſes in Law and Equity*, 2d Part, *pag.* 23, *& ant.* 55.

AN Account ſtated, and a Balance thereon made whereby 3000 l. was due to the Defendant's Teſtator. And the Plaintiff recited the Debt by the Account, and covenanted to pay to the Teſtator, and now ſued to be relieved, ſuppoſing that 200 l. to be mentioned in the Account, and wherewith he was thereby charged, and that tho' he was once charged therewith, yet at the Time of the Account he was not, becauſe when he came home he found that his Servant had paid the 200 l. to the Defendant's Teſtator; and that it was ſo entred in his Account-Book, but when he made the Account he had not his Books.

The Defendant by way of Plea ſaith, It was a ſtated Account, and the Balance thereof ſecured by Writing under Hand and Seal; and that he being but an Executor, knew not how to account; and ſet forth, that he believed that his Teſtator upon his Accounts delivered up his Notes and Vouchers, and that no ſtated Account could ſtand in Court, if this or that Particular of it ſhould be queſtioned.

But the Plaintiff to proceed no farther than Anſwer without Leave of the Court.

My Lord Keeper over-ruled the Plea, and cited Backwel and Squire's Caſe: But to proceed no farther than Anſwer without Leave of the Court.

Fowle *againſt* Green. June 17.

Heirs ſhall join in Sale for Debts.
Vide ant. 7, 252. *poſt.* 297.

J. S. ſeized in Fee deviſeth the Lands to his Executors to ſell, and pay Debts. The Heir ſhall be compelled to join in the Sale. And the Lord Keeper ſaid, it was ſo ruled in Parliament.

Terrel *againſt* Page.

All my Eſtate in a Will paſſeth a Fee.
Vide ant. 196.
New Ca. in Eq. 92.
1 *Chan. R.* 190, 203.
poſt. 309.

A Deviſe of divers Legacies in Money; and then a Deviſe followed of Lands. All the Reſt and Reſidue of my Money, Goods and Chattels, and other Eſtate whatſoever, I give to J. S. whom I make my Executor, he having other Lands. Decreed by the Lord Keeper that the other Lands do paſs.

DE
Term. S. Mich.
Anno Regis 27 Car. II.
IN
CANCELLARIA.

Smith *againſt* Aſhton. November 15.

J. S. ſeiſed of Lands in two Counties, conveyed Part to the Uſe of himſelf for Life, with Remainder, and Power to charge the Lands ſo conveyed, with 500 l. by Deed or Will in Writing, under his Hand and Seal. This Conveyance was voluntary, and without valuable Conſideration; and after by his laſt Will in Writing, not ſealed, deviſed the 500 l. to his younger Children, in whoſe Right the Bill is exhibited againſt his Son and Heir, to have the 500 l.

Againſt which the Counſel for the Defendant inſiſted, that the Law was againſt the Plaintiff; and both Parties claiming under a voluntary Settlement, and the ſame Conſideration, (viz.) Natural Affection; therefore he that hath the Law on his Side, ought not to be charged to the younger Children.

The Lord Keeper took Time to deliberate, and now decreed the 500 l. tho' the Will was not under Seal, and the Power not legally purſued. He cited Prince and Chandler's Caſe, decreed by the Lord Egerton, where there was a Power to make Leaſes on a Covenant to ſtand ſeiſed to Uſes, on Conſideration of natural Affection; and the Leaſe was for Proviſion for younger Children.

Decreed

Power not purſued decreed.
See the following Caſe.
2 *Vern.* 163, 164. *Ant.* 10, 17, 23, 104, 159, 160.
1 *Chanc. Rep.* 186.

Decreed good againſt the Heir, for two Reaſons, 1ſt. For that the Law was not then adjudged in Mildmay's Caſe. 2. Becauſe the Son did claim by the ſame Conveyance by which the Power was limited. So 17 June, 8 Car. the Jointure of the Counteſs of Oxford decreed good, where the Power was not purſued; yet only Part of her Jointure depended on the Queſtion.

For he that reſerveth ſuch a Power under Circumſtances, they are but Cautions that another might not be impoſed, or made without him. The ſubſtantial Part is to do the Thing; and therefore where it is clear and indubitable, the Neglect of the Circumſtances ſhall not avoid the Act in Equity; poſſibly when from Home or Sick, be remembred not the Circumſtance of his Power; and the Powers of this Kind have a favourable Conſtruction in Law, and not reſembled to Conditions, which are ſtrictly expounded; for a Power of this Kind may be executed by Part, and extinct in Part, and ſtand for the Reſt; but a Purchaſer ſhall defend himſelf in ſuch Caſe, but with Difference, tho' not executed according to the Circumſtances; for if he hath Notice (quære if he meant of the original Conveyance only, or of the ill executed Eſtate) he purchaſeth at his own Peril.

Smith *againſt* Aſhton. November 15.

Power not obſerv'd in Circumſtance, decreed.
See the foregoing Caſe, &c. there cited.
Alſo *ant.* 10, 17, 23, 159, 241.
1 *Chanc. Rep.* 1, 138, 185.
2 *Vent.* 350, 163.
2 *Chanc. Ca.* 29, 30, 87.
1 *Vern.* 79.
2 *Chanc. Rep.* 24, 366.
1 *Mod. R.* 310.

RAlph, the Grandfather of the Defendant, an Infant, had Power by Deed, or Will under Seal, to charge Lands in Yorkſhire, (which by the ſame Conveyance he intailed on the Heirs Males) with Monies, not exceeding 500l. He ſent Notes in Writing to J. S. to draw a Conveyance to Feoffees, but with Blanks for their Names, thereby to charge Lands in Cheſhire, called Wymondſly, with 1500l. Portions for younger Children; and if they ſufficed not for 1500l. to charge the Yorkſhire Lands with what was deficient. Deeds were prepared of Conveyances accordingly, and ingroſſed; but before they were ſealed, or Names of Feoffees inſerted, he died. Richard his Son and Heir, Father of one of the Defendants, upon Marriage with Beatrix, and 500l. Portion, ſettled the Copyhold Lands on Beatrix, with an Intail to the Heirs Males of that Marriage, and dies. The Bill is by the younger Children for their Portions, having

no other Subſtance, nor econtra, Beatrix and her Son any at preſent, if the Plaintiff prevail.

The Bill charged the Notes in Writing to be the laſt Will of Ralph the Grandfather; but no Mention in the Notes of any Reference of a Will, but a Conveyance, and a Conveyance prepared, but no Will.

On the firſt Hearing Direction was given for a Trial at Law, whether the Notes were Part of the laſt Will of Ralph; and a Verdict paſſed, that they were.

The Cauſe coming again to be heard, the Chancellor took Time to adviſe, and now decreed the Cheſhire Lands to be ſold for Payment of the Portions, and immediate Poſſeſſion thereof to the younger Children, and the Infant to be charged out of the Yorkſhire Lands ſo far as 500 l. if the Cheſhire Lands ſufficed not by Sale.

1. Note; This was decreed, though the Power of Charging was not obſerved in the Circumſtance.

2. Note; A Will, and no Writing, mentions it to be ſo.

Notes in Writing, a good Will of Lands. *Vide ant.* 126, 192. 1 *Chanc. Rep.* 268. But this is now alter'd by the Statute of Frauds, &c. 29 *Car.* 2. *c.* 3.

Anonymus. November 25.

A. Executor temporary, and after B. to be Executor. A. proved the Will, his Executorſhip ceaſed. B. might ſue without other Probate of the Will by him, by the Opinion of the Lord Keeper. And the Cauſe proceeded accordingly to a Decree of an Account.

Executor temporary. *Vide. ant.* 77.

Bullock *againſt* Knight.

BUllock for a Marriage to be had between Henry his Son and Bridget the Daughter of Knight; and being poſſeſſed of a Leaſe of one thouſand Years, articled to ſettle thoſe Lands in Conſideration thereof, to the Uſe and in Truſt for himſelf till the Marriage, and after the Marriage to the Uſe of himſelf for Life, and after his Death to Henry for his Life, and after to the Uſe of Bridget for her Life, and after their Deaths to the Uſe of the Iſſue of their two Bodies to be begotten, according to the Deſcent of Lands ſo entailed. The Marriage being had, the Leaſe was aſſigned to thoſe Uſes. Then the

A Leaſe on a Marriage ſettled in Truſt. *Vide ant.* 8, 9, 12, 28, 68, 128, 257, &c.

Father being dead, Henry the Husband granted his Interest over and dieth. Bridget survibeth and dieth. The Defendant takes Administration of Bridget. Bullock, the Father, was dead at such a Time as Henry made his Grant. The Assignee sueth for the Benefit of the Trust. And the Dispute on Plea and Demurrer was, to which the Benefit of the Trust belonged? There is no Issue living; but as I take it there was Issue born, but dead. And the Plaintiff made Title as Administrator also to the Issue.

Trust of a Term for a Feme Covert.

First, Sir John King for the Plaintiff objected, That the Trust of a Term limited to a Feme Covert was disposable by the Husband, and did bind the Wife for the Trust; for the Trust of a Term shall be of the same Nature as the Term is.

Lord Keeper. I should not doubt, if a Feme have the Trust of a Term for Years, and marrieth, but to decree it to the Alienee of the Husband (sed quære if to the Alienee; but it seems it must be to execute the Decree to the Husband, and then the Husband may alien; but the Lord Keeper said as before) When a Term is settled for the Maintenance and Jointure of the Wife, the Husband shall never bind the Wife by his Alienation.

Trust of a Term to Issue.
Vide ant. 8, 9, 68, 191, 208, 249, 299, &c.

2dly. It was debated, Whether the Trust limited to the Issue, were here in Nature of a Limitation, or by way of Purchase; so as the Issue born had then an Interest vested in him? For the Wife's Administrator could have no Title.

It was prest to be a Limitation, not a Purchase, the rather for these Words, In Course of Descent.

Lord Keeper. An Use to the Husband and Wife, and after to their Issue, they then having none, is all one as if limited to them and the Heirs of their Bodies; and the Issue takes nothing as a Purchaser.

3dly. Yet then it was objected by Sir John King, that the Husband may alien his Part; but it was not to my Intention fully enough prest that here the Articles were made before the Marriage; and consequently they took by divided Moieties.

The Lord Keeper ruled the Plea good.

Jefferſon *againſt* Dawſon.

On a Plea.

A Purchaſer of Lands incumbred with a Statute, purchaſeth in a precedent Statute, having no Notice of the firſt Statute.

Purchaſe protected.

Lord Keeper. If he had Notice of the ſecond Statute before he was dip'd in the Purchaſe, he ſhall defend himſelf by the firſt Statute, whether the ſame were paid off by no; if he can at Law do it, Equity ſhall not help him.

See 1 *Vern.* 51.

Note in Caſes proper for Law, a Man muſt take the legal Proceſs, &c. 1 *Vern.* 119.

Anonymus.

PRAT deviſed his Houſes in Sepulchres Pariſh to St. John's College, he being Tenant in Capite, and the Corporation miſ-named, which was a void Deviſe as to paſs the Lands, and ſo on former Proceedings certified by the Opinion of the Judges.

Deviſe void by Miſnomer of Corporation, ſupplied in Equity as a good Appointment of a Charitable Uſe.

The Lord Keeper notwithſtanding decreed it a good Appointment for a Charitable Uſe, within the Stat. of 43 Eliz.

But then it was objected, that if ſo, yet then the Proceſs and Method appointed by the Statute ought to be held, (viz.) A Commiſſion and Inquiſition, and Decree by Commiſſioners, and ſo to come at laſt to a final Decree by the Lord Chancellor or Lord Keeper, but not to ſue by Original Bill, as in this Caſe.

But the Lord Keeper decreed the Charity, though before the Statute no ſuch Decree could have been made.

Relief upon the Statute of Charitable Uſes by Original Bill, *ant.* 135. 158, 193, 198.

Then the Defendants claiming not only as Heirs at Law, but by a Title paramount the Deviſor, It was decreed againſt him as to any Title under the Deviſor, but not againſt the other Title.

But it was farther decreed, that at any Trial at Law he ſhould not inſiſt or give in Evidence the Invalidity of the Deviſe.

Referred to Law, and ordered, That the Defendant do not inſiſt on a Title ſet aſide by the Decree. He does inſiſt on it.

The Proſecutors for the Charity brought an Action at Law in the Common Pleas, where they made Title by the Deviſe; the Counſel for the Defendant not being informed before of the Decree, inſiſted that the Decree was void.

Whereupon the Plaintiff read the Decree, and the Plaintiff was non-suited, and then moved the Court of Chancery for a Commitment of the Defendant and Eſtabliſhment of the Poſſeſſion, which was ordered, niſi cauſa.

For Cauſe it was ſhewn, That the Title was voluntary, and the Court had ordered no Trial, and the Defendants Counſel were not appriſed that the Defendants had been ſerved with the Decree, and were willing to go to a new Trial on the other Title, and prayed farther Time to ſhew Cauſe becauſe of the ſhortneſs of the Time given to ſhew Cauſe.

Appeal to the King.

Lord Keeper. You labour to get an Appeal to the King, and ſo to delay; Let the Order ſtand.

Clifford *againſt* Asbley *and others.*

Fine and Non-claim bars a Truſt. *Poſt.* 278, *ant.* 210.

GEorge Low the Father being indebted 3000 l. for Profits of Lands which he received, by his Will deviſed, that if his Perſonal Eſtate fell ſhort, that his own Lands in the Counties of Wilts, Hereford and Lincoln ſhould be liable to make Satisfaction. There was a Decree againſt George Low the Son for Satisfaction out of the Lands, and he being dead, a Subpœna in the Nature of a Scire facias is brought againſt the Defendant as Tenant. And all the Defendants but Asbley, as Tenants of the Lands to George Low, plead inter alia, that they are ſeveral Purchaſers for a valuable Conſideration by Fine with Proclamation, after a Decree and Non-claim, without Notice. And whether this was a good Bar was the Queſtion, and long debated.

Jones 14 *Car.*

Lord Keeper. 1. A Fine with Proclamation and Non-claim will bar a Truſt, and ſo it was reſolved in the Exchequer.

Entry on the Land by a *Ceſtui que truſt*, is no ſufficient Claim.

2. And an Entry on the Land by a Ceſtui que truſt, is no ſufficient Claim, but it muſt be by Subpœna.

3. But there is a Decree which is more than a Truſt. And put Caſe that a Man have a Judgment on Debt at the Common Law, on which he may have an Elegit. The Defendant after Judgment aliens the Lands by Fine and Proclamation, and five Years paſs; the Plaintiff may have a Scire facias and Elegit; and why not? So here I anſwer, That in Caſe of a Statute or Judgment the Plain-

Plaintiff or Cognizee had no Interest in the Land; for if he release all his Right to the Land, yet he may sue Execution on the Land.

Much was said on the other side touching the Inconveniency and ill Consequence; on the one hand, how dangerous it would be for Purchasers, and how much the Statute of Fines would be weakned; on the other side, how Decrees would be weakned.

The Lord Keeper took Time to advise.

But Asbley's Plea was allowed, because as to the Lands, viz. Fisherton Anger which he claimed, George Low Party to the Fine was but Tenant in Tail, the Remainder over to his Brother, under whom Asbley claimed by Fine without Notice of the Trust or Decree.

Man *against* Cob.

THE Plaintiff, Lord of the Manor of Finchley, pretends himself Lord, and seised of Rents of the Defendants as Tenants of the Freehold. A Trial directed and found for the Plaintiff, and decreed that the Tenure and Seisin be admitted without farther Trial.

Tenure and Seisin of Rent admitted at a Trial.

Lord Keeper. Tenants use their Landlords badly now.

Note; Attornment, Seisins, Assents to Legacies, &c. are favoured in Equity. 1 *Vern.* 330.

Anonymus.

THE Inhabitants of Sutton Cofield were incorporated by H. 8. and the Manor and Park granted to them in Fee, by the Name of the Warden and Assistants, and the Grant was made to them; and it appeared by the Grant, that the same was for the Benefit of the Inhabitants for Ease of Taxes, and Relief of the Poor.

Grant to the Warden and Assistants for benefit of the Inhabitants.

A Suit was in the Star-Chamber touching Misimployment and Inclosing the Lands, whereby the Inhabitants were prejudiced; and there decreed that no farther Enclosure should be made without Consent of the major Part of the Inhabitants.

They cannot let without the Inhabitants.

In King Charles the First Time, some of the Principal of the Inhabitants, Mr. Pudsey and others took a new Charter, leaving out the Inhabitants; and now the Warden and twenty-three more made Leases and Inclosures without Consent of the major Part. And the Plaintiff an Inhabitant

tant on Behalf of himself and the rest of the Inhabitants do complain.

And the Lord Keeper decreed against the new Leases and Inclosures, and that no such should be without Consent of the major Part. And on Re-hearing confirmed this Decree; for though the Administration was in the twenty-four, yet the Benefit was for the Inhabitants in general; but it was pressed much that the twenty-four were the Corporation, and the Interest in them, and they might alien the Estate, and a fortiori Lease and Inclose; and it would breed Contention and Confusion if that the Multitude must intermeddle.

Anonymus. December 14.

Statute lost, not to be help'd by Motion, but a Bill against all Parties. *Vide ant.* 11,48,231. *post.* 292, 304.

THE Lord Keeper was moved touching a Statute lost to have it certified; and two Precedents were shewn.

Lord Keeper. They are Precedents not to be followed, and I will never do it. Exhibit your Bill against all that are concerned in the Land, and Justice shall be done you.

Note; Though this ought not to be done on Motion, yet on a Bill exhibited, if it appears a Statute, Recognizance, Deed, *&c.* to have been lost, or rendred void by Fraud, Force, or Accident, Equity will relieve.

A Defendant had suppress'd a Marriage Settlement, whereby a Remainder in Tail was limited to the Plaintiff's Father in Tail, and all the prior Estates being spent; 'twas decreed the Plaintiff should hold the Estate, though the Deed was lost. 2 *Vern.* 308.

On an Issue at Law, whether a Deed to lead the Uses of a Fine was duly executed, the Deed having been enrolled, and afterwards lost, a Copy of the Inrolment was allowed to be given in Evidence. 2 *Vern.* 471, 591. See also *ibid.* 561. And note *ibid.* 98. If a Lease of Lands by Deed is lost, the Lessor may declare on a Demise in general, without saying it was by Deed. See *New Equity Ca.* 86.

DE
Term. Sanct. Hill.
Anno Regis 27 & 28 Car. II.
IN
CANCELLARIA.

Corniſh *againſt* Mew. January 28.

COrniſh ſeiſed in Fee deviſed Lands to A. for Life, Remainder to B. in Fee. The Lands were before the Deviſe mortgaged in Fee for 100 l. and ſhe made A. Executor, and left Aſſets enough to pay the Debts, which B. in Remainder prayed it might go to the Payment of the Mortgage, as in caſe of the Heir, who ſhould be relieved upon the perſonal Eſtate in ſuch Caſe.

But the Court took a Difference; there indeed the Heir ſhall be relieved, but not a Deviſee; and decreed Tenant for Life ſhould be decreed one Third, and he in Remainder two Thirds, to redeem.

Vide ant. 223, 224. 1 *Vern.* 404. *Max. Eq.* 14. Difference between the Heir of a Mortgagor's being relieved upon the perſonal Aſſets, and a Deviſee in ſuch Caſe. *Ant.* 74. Tenant for Life decreed one Third; and he in Remainder two Thirds, to redeem.

Bertue *againſt* Stile.

THE ſame Day another Caſe, where a Jointreſs was of Land mortgaged, between Bertue and Stile; decreed that the Jointreſs paying the Mortgage, ſhe ſhould hold over till ſhe and her Executor ſhould be repaid with Intereſt.

A Jointreſs paying off a Mortgage, decreed to hold over till ſhe be ſatisfied.

See *Maxims of Equity* 19, 20. 2 *Chan. Caſes* 5, 84. *Ant.* 80. 1 *Vern.* 36, 37, 309, 436. 2 *Salk.* 449.

Brown

Brown *againſt* Vermuden. February.

Vide poſt. 282. Where a Pariſh is ſued, four moved to defend, and a Decree againſt them; one who claims under none of the four, conteſts the Decree.

Tithes of Lead-Oar. *Poſt.* 282.

Where a Pariſh is ſued, and four named to defend, and a Decree againſt them; one who claims under none of the four, conteſts the Decree.

Brown, Vicar of Worſelworth, ſued a Scire fac. and by Subpœna to have Execution of a Decree, had by and on the Behalf of one Carrier, his Predeceſſor, for the tenth Dick of Lead-Oar in the Pariſh, at the Charge and Labour of the Miners there, (viz.) the Vicar to pay one Penny a Dick. Carrier, his Predeceſſor, ſued divers Miners there, grounding his Suit by Preſcription. Four Perſons were named by the Miners to defend the Suit for them; and a Decree paſſed againſt the four, for Carrier and his Succeſſors, that the Defendants and all the Miners ſhould pay. Vermuden, who owned and wrought a Mine there being ſerved, appeared and inſiſted that he is not bound by the Decree, for that he was not Party or Privy, nor claimed under any who was; and if he ſhould be bound, then the Parſon ought to be bound, if the Decree had been againſt the Parſon, which could not; becauſe the Parſon nor Ordinary were no Parties, and the Defendant could have no Bill of Review of it, if it be erroneous, and therefore ought not to be bound.

The Lord Chancellor. 1. If the Defendant ſhould not be bound, Suits of this Nature, as in caſe of Incloſures, Suit againſt the Inhabitants for Suit to a Mill, and the like, would be infinite, and impoſſible to be ended. And declared, that the Defendant, though no Party nor Privy, yet he may have a Bill of Review, becauſe he is grieved by the Decree.

2dly. The Defendant inſiſted on the Juriſdiction of the Dutchy-Court, the Pariſh being Part of the Dutchy, and the King had Cap. and Lat. as in Right of a Dutchy, and a Court of Revenue.

The Chancellor. It is within the County Palatine; this Court may hold Plea of Lands in the Dutchy.

3dly. The Court who made the Decree held the 1 d. per Dick too little, and ordered a Commiſſion to ſettle ſome more reaſonable Recompence to the Miners, which never was executed. Non allocatur.

4. Sir John Heath was Tenant in Common with Vermuden, who ought not to be prosecuted alone. But the Defendant notwithstanding was ruled to perfect his Answer to the Interrogatories.

The Lord Chancellor. The Question is, Whether the Decree while it stands should be obeyed, not whether it be well made?

..... *against* Hawkes. February 11.

Relief for an Annuity against a Purchaser. See 2 *Vern.* 447.

HAwkes in his Purchase had Notice of the Plaintiff's Annuity, for it was excepted in his Deed of Purchase, which contained Part of the Lands charged, and divers other Lands. After Hawkes sold the other Lands not charged, and also some few Acres of the Land charged by general Words, and desired the Plaintiff and her Husband to join in a Fine to the Person who bought them, and was assured by Hawkes, that the same would not prejudice her in the Lands settled on her: But this was proved by one Witness only, and his Depositions uncertain as to the Particulars.

Also it was proved, that another Person had also bought and was in Possession of three Acres of Land charged, and was no Party to the Bill; and that no Relief ought to be in Equity, because the Extinguishment of the Rent being a Rent-charge was by the Plaintiff's own Act by a Fine. And however Hawkes could not be charged, there being no Apportionment to be made, the Tenant of the three Acres being no Party to the Bill.

Rent-charge, where not extinguished or apportioned. *Vide ant.* 32, 79, 80.

The Lord Chancellor. Here was no Consideration for the Rent, and no Agreement to extinguish it; and when the Land was sold, it was sold for 800 l. of which 700 l. was paid to Hawkes. The Widow was circumvented, and decreed Relief against Hawkes.

Richardson *against* Louther. February 12.

Alteration of Exhibits after Commission.

CErtain Exhibits of Writings were given in it at a Commission for Examination of Witnesses. The Defendant suggested that the Exhibits were altered and interlined since the Commission executed, and prayed a Commission to examine that Point.

When the Party hath a Commiſſioner preſent, he can never examine new Interrogatories by Commiſſion as to the Merits.

Objection. When the Party hath a Commiſſioner preſent, he can never examine new Interrogatories by Commiſſion.

Reſp. True as to the Merits. But this hath happened ſince, and not examined to by the Commiſſioner, not being then in Being.

Object. How could the Defendant know this but by Diſcovery of his Commiſſioner, who ought not to diſcover the Examination?

But yet the Lord Chancellor ordered a Commiſſion.

Taylor *againſt* Debar, *&c.* February 24.

A bad Title ſold with Covenant for further Aſſurance, and afterwards the Vendor purchaſeth the good Title.
Vide poſt. 287.
Ant. 252, 259.
1 *Chanc. R.* 159.

A Purchaſer of the Crown Lands in the Time of the late Wars, ſells Part to the Plaintiff, and covenants to make further Aſſurance. He on the King's Reſtitution for 300 l. had a Leaſe for Years made to him under the King's Title. The Decree was, he ſhould aſſign his Term in the Part he ſold. *

* For in ſuch Caſes Equity will decree a ſpecifick Performance of the Covenant or Agreement; and that in ſome Caſes where the Agreement was only by Parol. See 1 *Vern.* 48, 110, 201, 159, 189, 296, 217, 229. 2 *Vern.* 200, 322, 373, 455, 272, 280, 394, 423, 447.

DE
Termino Paſchæ,
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Anonymus. April 30.

Proof of a Creditor's Debt diſallowed by Commiſſioners; the Court will hear the Proof.

A Creditor offered Proof of his Debt to the Commiſſioners of Bankrupt, which they diſallowed. Diſtribution was not yet made. It was alledged that the Proof was ſufficient, and moved that the Lord Chancellor would be attended by both Sides to hear and give Order therein.

The Lord Chancellor. Why ſhould I not leave it to the Courſe the Statute hath provided? If it be granted in one, it will be asked on all Caſes. Yet at laſt it was ordered.

Whitton *againſt* Lloyd. May 1.

Debts before Legacies, where Lands are deviſed. *Vide ant.* 136, 149, 248, 257.

A. Deviſeth his Lands to his Executors, towards Payment of his Debts and Legacies.

The Lord Chancellor. Debts muſt be paid before Legacies: And decreed his Debts to be fully paid before his Legacies, and took a Difference between ſuch Appointment made by Conveyance, and by Will.

Waller *againſt* Dalt. May 1.

A young Gentleman takes up Wares, &c. and relieved. *Ant.* 202. *Max.* 1. *Ca.* 7. *Max.* 2. *Ca.* 4. 2 *Chan. Ca.* 15. 1 *Vern.* 238, 346, 467, 475.

WAller, a young Gentleman, and two others, imployed one Willis to borrow 500 l. Willis imployed Wiltſhire, who ſpoke to Dalt a Silkman, and bought of him Silks for 500 l. The Plaintiff gave Bond and Judgment for the Money. Wiltſhire ſold the Silks for 250 l. and kept 50 l. for his and Willis's Pains, and paid 200 l. to the Plaintiff. The Defendant never treated with the Plaintiff. And denied on Oath that he ever treated about the Loan of Money, and depoſed the Silks to be of 500 l. Value, or thereabouts; but Proof to the contrary.

Decreed only 200 l. and Intereſt (Quære for the Intereſt) and Relief againſt the Defendant quoad reſid.

See the Caſe 1 *Vern.* 467. Where three young Heirs had bought Goods of a Tradeſman, and bound themſelves to him jointly, &c. to pay thrice the Value at their Father's Death; yet each of them was relieved on Payment of what was the Value of the Goods, which he ſeparately had; and the like Caſe in 2 *Vern.* 77. See alſo 2 *Vern.* 14 and 27. of unconſcionable Bargains got from Heirs ſet aſide in Equity.

See young Heirs, who had ſold their reverſionary Intereſts in Eſtates at under Value, relieved in Equity, 1 *Vern.* 167, 271.

One juſt come of Age entitled to an Eſtate of 3000 *l. per Ann.* being drawn into a Statute for 1000 *l.* on which he received only 500 *l.* was relieved againſt the Stat. 2 *Vern.* 346.

And a Multitude of Caſes are where Equity has relieved againſt catching Bargains, and fraudulent or underhand Agreements. *Vide* 1 *Vern.* 46, 51, 237, 240, 346, 348, 475. 2 *Vern.* 71, 123, 150, 151, 602.

And note; In Deteſtation of Fraud, Equity has ſet aſide not only Articles, Agreements, Conveyances, Marriage-Settlements, Wills, &c. but even Fines, Recoveries, Judgments, and other Matters of Record. See 1 *Vern.* 60, 84, 132, 205. 2 *Vern.* 56, 58, 121, 326, 700, &c. *New Eq. Ca.* 80, 83, 96.

DE
Term. Sanct. Trin.
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Bulſtrode *againſt* Lechmore. June 4.

THE Bill was to diſcover an ancient Deed of Intail ſuppoſed to be in the Defendant's hands, and that he had peruſed it; and that in Diſcourſe he had acknowledged ſuch Deed, and other like Charges.

The Defendant ſaith by Plea, that he was a Counſellor with A. B. That on a Reference between the Parties, it was agreed that nothing that paſſed then, ſhould be made Uſe of on either Side, or be diſcloſed.

The Lord Chancellor ordered that what the Defendant knew only as Counſellor, or under ſuch Contract of Silence, he ſhould not be put to anſwer.

Ingagement of Silence by a Counſellor, he ſhall not be put to anſwer. *Vide ant.* 66. *Curſus Canc.* 38, 39, 112.

Moor *againſt* Blagrave. June 9.

A Legatee of a Term ſued for it, but made not the Executor Party; and therefore the Bill was not good, tho' the Executor to the Legacy was alledged in the Bill to conſent by the Plaintiff Aſſignee of the Legacy.

Legatee of a Term ſues, and the Executor no Party, not good; tho' charged that the Executor had aſſented. *Vide ant.* 51, 74, 77, 141, 219.

Salisbury

Salisbury *againſt* Baggot. June 23.

Sir William Jones's *Rep.* 416.

AMong many other Queſtions, which aroſe in the Caſe, ſome were about the Operation of a Fine with Proclamation and Nonclaim thereon, of which the Lord Chancellor having heard the Cauſe ſeveral Days, took Time to adviſe, and now declared his Opinion at large.

The Bill was to have Articles made on good and valuable Conſideration ſixty Years before decreed, by which the Lands in Queſtion were to be ſettled on A. the Father for Life; Remainder in Tail to him, whoſe Son and Heir the Plaintiff is.

Fine and Nonclaim. *Ant.* 220, 268.

The Defendants inſiſted on a Fine and Nonclaim, which the Plaintiff would inter alia avoid by Infancy of himſelf and of his Father, and of Entry made by himſelf within five Years after the Death of A. who was Tenant for Life.

The Lord Chancellor in ſeveral other Points touching Notice, &c. was of Opinion for the Plaintiff, but diſmiſt the Bill on Conſideration of the Fine.

Fine and Nonclaim bars Equity and Truſts, *i. e.* where the Lands only are charged. But where the Lands are charged in reſpect of the Perſon, it bars not. *Vide ant.* 220, 268.

1. That a Fine and Nonclaim bars all Truſts and Equity; and ſo it was reſolved by all the Judges between Cary and Sir Thomas Thynn, where the Equity was of a Practice in gaining a Conveyance of Lands, and ſince reſolved in the Exchequer, where a Truſt was barred, elſe no Man could know when he was ſure of an Inheritance: But this is on two Differences:

1ſt. Where the Equity chargeth the Lands as in the aforeſaid Caſes, there the Fine bars; but where it chargeth the Perſon in Reſpect of the Lands it doth not bar, as in the Lord Knowl's Caſe, wherein a Fine and Nonclaim barred not.

That Fine can never bar the Equity or Truſt which it creates. Claim of an Equity to avoid Fine, can be no otherwiſe but by *Subpœna*.

2dly. If the Equity or Truſt be created by the Fine, that Fine ſhall never bar the Equity which it created. But the Objection that there is a Claim within the five Years of the Death of the Tenant for Life, by the Iſſue in Tail, helps not, in Reſpect of the Manner of Claim; for the Claim is to be of an Equity which can be made no other Way but by Subpœna. In Caſes of lawful Entry or Action, Equity makes not an Entry lawful. Entry of an Iſſue after Diſcontinuance is no Claim, but it muſt be by Formedon; the Statute hath taken away the Claim at Common Law ſub pede Finis.

2. The Claim in Equity in this Case is to have an Assurance or Conveyance made, which the Father of the Plaintiff might have sued for, being long ago, and that being vested in the Father, his Non-claim thereto shall bar his Son the Plaintiff. But if the Conveyance had been made, then the Entry of the Plaintiff had been a good Claim to avoid the Fine; for no Man shall be inforced to take advantage of a Forfeiture. It is Time enough for him in Remainder to enter after the Death of Tenant for Life. But here is no Title to the Lands, but an Equity to have the Conveyance of the Lands settled on a Lease for Life, the Remainder in Tail.

Quære, If the Party, who should make the Settlement, should die without Heir, or the like? And Quære, If one be entitled to have the Land conveyed, have not a Title to the Land in Equity?

Clotworthy *against* Melliſh. June.

A Plea and three insufficient Answers, whether to be examined on Interrogatories. *Ant.* 60, 66, 238.

Plea to part, and Demurrer to part; the Plea overruled. Then the Defendant answered, and that being insufficient he put in another Answer, and that reported insufficient, he put in a fourth Answer: If the first be accounted one.

The Lord Chancellor did not commit him to be examined on Interrogatories.

Cavendiſh *against* .....

No Relief against an Award made without Order of Court, unless for Corruption. *Vide ant.* 40, 86, 185, &c.

Exceeding Authority, &c. for there the Parties chuse their own Judges; but if by Consent and Order of Court, it shall be set aside if unequitable.

Matters in Difference referred by Consent and Order of the Court to Mr. Birch and two others, or any two of them. Two made the Award, and now Exceptions were taken to the Award on the one side, and the other side moved it might be decreed.

The Lord Chancellor. If the Parties without the Court refer the Differences, they chuse their own Judges; and this Court relieveth not against the Award, unless it be in a Case of Corruption, exceeding Authority, or the like. But when a Reference by Consent and Order of Court, if it appear unequitable, this Court will not decree it. And accordingly in this Cause set aside the Award and Bond of Submission. The Reason was, because it concerned

Award that he ſhall procure the Infant to convey when at Age, ſet aſide, becauſe unreaſonable.

cerned an Infant, to whom 450 l. was awarded; and that Bond ſhould be given by the Guardian, that the Infant ſhould at his full Age convey the Lands in Queſtion, which is not reaſonable, for he may die; or if he live to Age, refuſe to convey; ſo it is not mutual.

The Court will decree no Award to bind an Infant.

The Lord Chancellor alſo ſaid, he would never decree an Award which ſhould bind an Infant.

Where Equity favours or privileges Infants, ſee 1 *Vern.* 39, 173, 295, 296, 328, 428, 435. 2 *Vern.* 225, 232, 236, 342, 368, 480, 561, 711.

Popham *againſt Sir* John Hobert, *Nephew of Sir* John Hobert, *deceaſed.*

Ant. 32, 177, 179. *Poſt.* 297.

Lands ſettled in Fee on Truſt, to ſell ſo much as the Truſtees ſhould think fit for Payment of Debts and Legacies, and the Overplus to his Daughter and her Executors.

1. Whether the Truſtees can ſell more than is ſufficient.

2. The Daughter being dead without Iſſue, whether the Lands belong to her Adminiſtrator or her Heir.

THE Caſe was, Sir John Hobert had two Daughters, Dorothy (married in his Life-time to Sir John Hele, whoſe Grandchild and Heir the Plaintiff married) and Philippa. And having ſuch Iſſue, ſettled divers Lands in Norfolk on Truſt in Fee, that they and the Survivor of them within two Years after his Deceaſe ſhould ſell, as they ſhould think fit, and that the Monies raiſed by Sale, and the Profits in the mean Time ſhould be imployed towards Payment of his Debts and Legacies that ſhould be left unpaid by his Executors; and the Overplus, after ſuch Debts and Legacies paid, to ſuch Perſons as he ſhould appoint by his Will; and in Default of ſuch Appointment, to Philippa and her Executors, which he after by his Will confirmed, and died in 1647.

Philippa married the Defendant in 1647. and after her Father's Death had Iſſue by him, and died, and then the Iſſue of Philippa alſo died an Infant without Iſſue.

The Defendant took Adminiſtration to his Wife. The Truſtees had paid off ſome Debts and ſold ſome Lands; ſome Lands remained unſold, and ſome Debts unpaid. The Defendant obtained from the Truſtees a Conveyance of the Lands, becauſe the Surpluſage of the Money of the Lands ſold was to go to his Wife, her Executors and Adminiſtrators.

The Plaintiff and his Wife as Heirs to the Teſtator, and Philippa the Wife, prayed an Account, and to have the Lands unſold. To which the Defendant pleaded the Matter.

The Lord Chancellor ordered the Matter to be put in by way of Anſwer.

Reaſons

Reasons against the Plea were urged.

1. The Lands are not appointed to be sold absolutely, but to be sold as the Executors should think fit, which is all one as if it had been sold, if they find Occasion for Payment of Debts and Legacies. But in such Case they have not a pure and absolute Power and merely Arbitrary, but subject to the Rules and Laws of Equity; for in Case the Estate personal would suffice to pay the Debts, they may not sell the Land and pay the Debts with that Money, and keep the personal Estate to themselves.

Power to sell Lands, subject to the Rules and Laws of Equity; *vide ant.* 18, 104.

2dly. And as they are restrained from selling in Case the personal Estate can pay all, so if it will pay Part proportionably according to reasonable Circumstances, in that Case they may sell, and not otherwise. Quære therefore if the Executors should not be made Parties.

3dly. When Philippa the Wife died, the Surplus or necessary Sale will belong to the Administrators; but it did not lie in the Power and Election of the Husband, her Administrator or Trustees to sell without Necessity, and thereby to give in Effect the Value of the Lands, or the Lands themselves from his Child that survived her, and was Heir to the Husband, and thereby disinherited the Child, and in Effect intitled the Administrator to the Lands by way of Bargain.

4thly. Put case the Husband had died before the Wife, and a collateral Kinsman had taken Administration to the Wife dying after her Husband, he might as well have done it as now the Husband has done; he could not with any Colour have had the Lands, and the Husband hath no other Title, but what such Stranger should have (viz.) as Administrator, not as Husband.

5thly. No Administrator in such Case is to be preferred before an Heir. The Heir shall enforce the Administrator to preserve the Inheritance from Sale by the personal Estate to pay Debts.

Objection. The Name is preserved, she marrying a Hobert.

Answer. The Marriage was two Years after the Testator's Death, and therefore could be no Consideration of this Bequest; for she might have married any other Person, and such Husband should have as much Right as Sir John Hobert.

The Title that the Son had while he lived, descends to the Plaintiff as his Heir, and did so descend before the

Tranſaction between the Defendant and the Truſtees, and the Truſtees might not make then whom they pleaſed Heir to the Lands.

The Husband without a Fine by the Wife, could not bind the Wife and her Heirs to take from her the Power to clear the Eſtate by Payment of the Debts, nor conſequently to bar her Heir thereof.

Of the Creation and Execution of Powers, &c. as regarded in Equity, *vide* 1 *Vern.* 85, 355, 406, 7, 414, &c. 2 *Vern.* 80, 376, 379, 528, 531, 532, 665, 421, 513.

Brown *againſt* Vermuden.

For Tithe of Lead Oar, a *Modus Decimandi* decreed. *Ant.* 272. See 1 *Vern.* 60, 185. 2 *Vern.* 46. *New Ca. in Eq.* 117.

BRown Parſon of Worſelworth exhibited a Bill againſt Vermuden to have Perfoꝛmance of a Decree obtained againſt certain Perſons Woꝛkers and Owners of Lead Mines in Derbyſhire, whereby a certain manner of tithing of Lead Oar was decreed, not only againſt the particular Perſons named Defendants, but all other Owners and Woꝛkers.

Vermuden pleaded inter alia, That he was a Stranger, and claimed not under any Party oꝛ Privy to the Bill, and therefoꝛe inſiſted he ought not to be proſecuted by a Bill not grounded on the Fact and Title, but on the Decree in the Nature of a Scire facias.

This Plea was foꝛmerly ovꝛr-ruled by the Lord Chancellor, vide fol. 272. But a Commiſſion granted to examine the Quantity and Value of the Oar, and the Plaintiff's Title, if Parſon, &c. The Six Clerks appointed Time and Place, but the Defendant's Witneſſes were ſo aged, that they could not come to the Place, and therefoꝛe a new Commiſſion prayed.

Commiſſioners adjourn.

Lord Chancellor. The Time and Place is only foꝛ the firſt meeting of the Commiſſioners; but after they may adjourn to another Time oꝛ another Place.

Note; Tithe of Oar is not due in general, except there be a Special Cuſtom for Payment of it. 2 *Vern.* 46.

The Lord Keeper Finch.

Giles Thornbrough, *Clerk, and* Jane *his Wife, Daughter and Heir of* Lawrence Clifton, *Gent. Plaintiffs*; John Baker *Son and Heir of* James Baker, *and* John Nichols, *Esq; and* Sarah *his Wife, Administratrix of* James Baker, *Defendants.* July 10.

Where the Mortgage Money shall be paid to the Heir or Executor.
1 *Chan. Rep.* 17.

THE Plaintiff's Bill being, That the said Lawrence Clifton, by Indentures of Lease and Release between him and the said James Baker, bearing Date the 20th and 21st of October 1656. in Consideration of 500 l. paid to him by the said James Baker, did convey to the said James Baker and his Heirs several Lands in Stoak in the County of Surry; and by another Indenture executed at the same Time between the same Parties, it was agreed between them, that if the said Lawrence Clifton should during his Life pay to the said James Baker, his Heirs, Executors, Administrators or Assigns, 30 l. yearly at Lady-day and Michaelmas, or within thirty Days after, by equal Portions; and if the Heirs of the said Lawrence should within six Months after the Death of the said Lawrence pay to the said James Baker, his Heirs, Executors, Administrators or Assigns, the Sum of 500 l. with Interest since the paying the last 15 l. then the Lease and Release should cease and be void; and about one Year after the said Lawrence Clifton died, leaving the said Jane his only Daughter and Heir: And by another Indenture bearing Date the 25th of May 1658. made between the now Plaintiff and the said James Baker, did covenant with the Plaintiff, that if they or either of them should pay to the said James Baker, his Heirs, Executors, Administrators or Assigns, the Sum of 20 l. only on the 20th of October then next following, and the Sum of 530 l. on the 20th of October 1659. that then the said Indenture of Lease and Release should be void: And the said James Baker died about May 1659. and the Premisses being forfeited, they descended to the said Defendant John Baker, Son and Heir to the said James; and the Defendant Sarah, the Relict of the said James Baker, having administred of

his Eſtate granted to her, her ſaid Husband John Nichols, and ſhe does pretend to the ſaid Mortgage; and the Plaintiff praying a Recompence on Payment of what was due, the Defendant John Baker by his Anſwer confeſſing the Mortgage and Agreement aforeſaid, and that the Mortgage being forfeited, deſcended upon him as Heir to his Father, and ſubmitted to reconvey the Premiſes on Payment of Principal, Intereſt and Coſts to him, the Defendant and John Nichols and his Wife; confeſſing the ſaid Mortgage, and inſiſting that the ſaid Sarah was Adminiſtratrix to her former Husband, and thereby intitled to the ſaid Mortgage Money and Intereſt, although he hath other Aſſets of her Husband's Eſtate, with a conſiderable Overplus.

It was, upon the Hearing of the Cauſe the 11th of February, in the twenty third Year of his now Majeſty's Reign, decreed by the Maſter of the Rolls, That upon Payment of Principal, Intereſt and Coſts, The Defendant John Baker ſhould reconvey the Premiſes. And it was then farther ordered, that the Party ſhould attend the Right Honourable the Lord Keeper of the Great Seal of England for his Lordſhip's Directions, Whether the Principal and Intereſt ſhould be paid to the Defendant John Baker the Heir, or to the Defendant Sarah, the Relict and Adminiſtratrix of the ſaid James Baker; ſince which the ſaid Principal and Intereſt having been paid by the Plaintiff, and a Reconveyance made unto them; but the Queſtion between the Heir and the Adminiſtratrix being not ſettled; Now upon hearing and full debating of the Matter this preſent Day by Counſel learned, as well for the Heir as the Adminiſtratrix, whether the ſaid Principal Money and Intereſt doth belong, and ought to be paid to the Heir or Adminiſtratrix; and the former Precedents being produced, the Lord Keeper having been attended with the ſaid Cauſe and Precedents, and having taken Time to conſider thereupon, did now declare, that the Mortgage ought to go to the other Defendant John Nichols and his Wife, the Adminiſtratrix of James Baker, and not to John Baker, Son and Heir of the ſaid James Baker; becauſe the Reaſon of the Common Law in theſe Caſes ought, as near as may be, to be followed in Equity. Now by the Common Law, if the Conditions or Defeazance of a Mortgage of Inheritance be ſo penned, that no Mention is made either of Heirs or Executors to whom the Money ſhould be paid; in that Caſe

Equitas ſequitur Legem.
Vide ant. 84.

the Money ought to be paid to the Executrix, in regard that the Money came first out of the personal Estate, and therefore usually returns thither again; but if the Defeazance appoints the Money to be paid either to Heirs or Executors disjunctively, there by the Common Law, if the Mortgagor pay the Money precisely at the Day, he may elect to pay it either to the Heirs or Executors, as he pleaseth: But where the precise Day is past, and the Mortgage forfeited, all Election is gone in Law; for in Law there is no Redemption. Then when the Case is reduced to an Equity of Redemption, that Redemption is not to be upon Payment to the Heirs or Executors of the Mortgagee, at the Election of the Mortgagor; for it were against Equity to revive that Election; for then the Mortgagor might defer the Payment as long as he pleaseth, and at last for a Composition by Payment of the Money to that Hand which will use him best; much less can the Court elect or direct the Payment where they please, for a Power so arbitrary might be attended with many Inconveniencies throughout. Therefore to have a certain Rule in these Cases, and a better cannot be chose than to come as near unto the Rule and Reason of the Common Law as may be. Now the Law always gives the Money to the Executor where no Person is named, and where the Election to pay to either Heir or Executor is gone and forfeited in Law, 'tis all one in Equity, as if either Heir or Executor were named, and then Equity ought to follow the Law, and give it to the Executor; for in natural Justice and Equity, the principal Right of the Mortgagee is to the Money, and his Right of the Land is only as a Security for the Money; wherefore when the Security descends to the Heir of the Mortgagee, attended with an Equity of Redemption, as soon as the Mortgagor pays the Money, the Lands belong to him, and only the Money to the Mortgagee, which is meerly personal, and so accrews to the Executors or Administrators of the Mortgagee. And for this Reason a Mortgage of an Inheritance to a Citizen of London hath been held to be Part of his personal Estate, and divided according to Custom. And tho' it may seem hard that the Heir should part the Land, and be decreed to make a Recompence without having the Money which comes in lieu of the Land; yet it will not seem so to them who consider that the Land was never more than a Security; and that after

Vide prox. pag. in Margine.

Where the Mortgage Money shall be paid to the Heir or the Executor, in Law or Equity, elective.

The Nature of a Mortgage.
Vide ant. 1, 2.

Mortgage of an Inheritance to a Citizen of *London* Part of his personal Estate, and to go according to the Custom.
Ant. 181, 199.

after Payment of the Money, the Law keeps a Trust for the Mortgage, which the Heir of the Mortgagee is bound to execute; and his Lordship declared that the Right to a Sum of Money, which is a personal Duty, ought always to be certain, and not to be variable upon Circumstances. Wherefore his Lordship did not think it material that the Administratrix in this Case had Assets without this Money; for Assets or not Assets is not the Measure of Justice to Executor or Administrator, but serves only as a Pretence to favour the Heir, who either ought to have the Money if there be no Assets, or not to have it tho' there be Assets. And for the same Reason his Lordship did not think it material that there wanted Circumstances of a personal Covenant from the Mortgagor to pay the Money; for tho' the Case of the Administratrix of the Mortgagee had been stronger with it, yet it is strong enough without it. His Lordship declared that he had considered the various Precedents in this Case which had been urged, whereof not one did come to the very Point, there being a great Difference between a Mortgage and an absolute Conveyance, with a collateral Agreement to reconvey upon Repayment of the Purchase Money; the other late Precedents, which made for the Heir, being contrary to the more ancient Precedents of this Court, and to some modern Precedents also, which seemed to his Lordship of more Weight, his Lordship being of Opinion that all Mortgages ought to be looked upon as Part of the personal Estate, unless the Mortgagee in his Life-time, or by his last Will, do otherwise declare and dispose of the same. Wherefore, and upon the whole Matter, his Lordship having fully weighed the Precedents, and what was said on either Side, doth order and decree that the Mortgage Money and Interest shall be paid unto the said John Nichols and his Wife, and kept by them; and that what Security hath been given by either of them concerning the Disposing of the said Monies and Interests, or the Abiding the Order of this Court, as to the Payment of the said Money and Interest, be delivered up to them and cancelled.

Difference between Mortgage and an absolute Conveyance, with a collateral Agreement to reconvey. *Ant.* 1, 2.

Mortgages look'd upon as Part of the personal Estate. See 1 *Vern.* 271, 412. 2 *Chan. Ca.* 49, 50, 51, 220. 2 *Vent.* 348, 351. *Ant.* 98. 3 *Chanc. Rep.* 187.

But note, though in this Case, as in a Multitude of others, the Mortgage-Money was decreed to be paid to the Executor, because the Money came first out of the personal Estate, and therefore ought to return thither again; yet where a Man purchased of a Mortgagee, apprehending he had an absolute Estate, and the Mortgagor came to redeem, the Money was decreed to be paid to the Heir of the Purchaser, and not to his Executor, for that he intended it for the Benefit of his Heir. 1 *Vern.* 271. See *Maxims of Equity* 21, 22. and the Cases *ibid.* 3 *Chanc. Rep.* 222.

DE
Term. S. Mich.
Anno Regis 28 Car. II.
IN
CANCELLARIA.

Biſco *againſt the Earl of* Banbury, *Son and Heir of* Nicholas *Earl of* Banbury. 24 October.

ON hearing the Cauſe by Appeal from a Decree formerly pronounced by the Lord Chancellor. The Caſe was,

Edward Lord Vaux, Father of Nicholas Earl of Banbury, on the Marriage of Nicholas his Son Earl of Banbury, and Elizabeth Wife of the ſaid Lord Vaux, Father and Mother of Nicholas, with Iſabel Daughter of the Lord Mountjoy, in Conſideration of the ſaid Marriage, and 8000l. Portion, inter alia, ſettled the Manors of Great and Little Harrowden to the Uſe of Nicholas and Iſabella for their Lives, the Remainder to the Earl of Salisbury, and others, the Survivors of them for ninety-nine Years, in Truſt to raiſe 6000 l. for Portions for the Daughters of the ſaid Marriage, the Remainder to the Heirs Males of the ſaid Nicholas by Iſabel, with Remainder over, the Remainder to the Lord Vaux in Fee.

A Truſt for raiſing a Sum of Money on a Term which happens to be void, transferred to another Term, whereon the Grantor had Power to charge it. *Vide poſt.* 298.

29 Jan. 1651. Nicholas and Iſabel, in Conſideration of their Marriage formerly had, and a Portion of Money paid, and natural Affection, convey the ſaid Manors to Ruſſel, and Rich and Lake, to the Uſe of Nicholas for ninety-nine Years,

Years, if he lived so long, the Remainder to Isabel for her Life, the Remainder to Russel, Rich and Lake, for the Life of Nicholas to preserve the Contingent Remainders after limited, the Remainder to the first, second, &c. and other Sons of Nicholas by Isabel, and the Heirs Males of their Bodies, the Remainder to Russel, Rich and Lake for ninety-nine Years, with Remainder over. The Trust of this Term, to the Use of such Persons to whom the Sum of 6000 l. as the said Isabel according to a Proviso should appoint.

The Proviso was, That if Nicholas or his Heirs, or other Person, Owner (of the Reversion on the ninety-nine Years) should pay such Sum not exceeding 6000 l. as Isabel by her last Will in Writing should appoint, whether she was Covert or Sole, then the Lease to cease, and until such Payment to the Use of those Persons, &c.

Proviso, That Nicholas with Consent of Isabel, Russel, Rich and Lake in Writing express, may revoke all and every the said Uses, and limit new.

14 January 1652. The Lady according to that Proviso, revokes all the Uses in the Deed, 20 January 1651. and declares that a Fine and Recovery was to be had to the Use of Russel, Rich and Lake, and their Heirs, in Trust, That they execute a Deed prepared to be dated 28 Febr. instant, for securing of 2000 l. to Sir Thomas Hewet of Part, and to stand seized of the Residue to the Uses in the Covenant of the 29 January 1651. and then to convey the Premisses accordingly.

18 February 1652. Part of the Premisses are demised by Russel, Rich and Lake to Sir Thomas Hewet for five hundred Years for securing the 2000 l. with Power of Redemption on Payment.

In this Conveyance, Nicholas, Isabel, the Lord Vaux, Father of Nicholas, and divers other Persons join. And in this Indenture it is recited, that the said Nicholas according to Power in a Deed 28 January 1651. he the said Nicholas by Indenture dated 24 February, with Consent, had revoked every the Uses in the Indenture, 20 January 1651. and declared the Use thereof to Russel, Rich and Lake, and their Heirs, to the Intent to join in and execute the Security therein mentioned, and afterwards to convey to the Uses in the tripartite Deed mentioned, that is, the Deed 29 January 1651. as by the said Indenture of Revocation appeareth.

13 January

13 January 1651. There are divers other Recitals, & inter alia, a Leaſe of the ſaid Manors made 13 Febr. 1651. to Engrim and others for Years, determinable on the Death of Nicholas Earl of Banbury. And it is agreed that 'till Default of Payment of the 2000 l. to Sir Thomas Hewet, the Profits of the ſame ſhould be diſpoſed according to the Truſt in that Indenture, (viz.) for the ſaid Nicholas, &c.

Anno 1653. Nicholas, &c. conveys the ſaid Manors to the Uſes mentioned ſupra, (viz.) to the Uſe of Nicholas for Life, the Remainder to Iſabel for Life, the Remainder to Ruſſel, Rich and Lake for the Life of Nicholas, to preſerve contingent Remainders to firſt, ſecond, third, &c. Sons of Nicholas, &c. ut ſupra, the Remainder to Ruſſel, Rich and Lake for ninety-nine Years, then next, and that Ruſſel, Rich and Lake during the ſaid Term, ſhould imploy the Rents and Profits of the Premiſſes to the raiſing of ſuch Sums of Money as Iſabel by Will in Writing, or other Writing ſhould appoint, and at ſuch Time, and in ſuch Manner, and to ſuch Perſons ut ſupra, and in Default of Payment at ſuch Times the Perſons to whom, &c. to take and receive the Profits prout ſupra.

Proviſo of Revocation in terminis prout ſupra.

The Lady Iſabel by Will appoints Payment of the 6000 l. to the Plaintiffs, and others, and ſhe dieth. Nicholas on Treaty of Marriage to be had with the Counteſs and 4000 l. Portion, covenants to levy a Fine of the ſaid Manors to the Uſe of Nicholas for Life, the Remainder to the Defendant for her Life for her Jointure, the Remainder over in Tail.

In this Aſſurance are the Incumbrances excepted of the ninety-nine Years, and 6000 l. Daughters Portions in the Deed 1649. and the Mortgage made to Sir Thomas Hewet for 2000 l.

The Bill is now to have the other Sum of 6000 l. limited by the Deed 1653. and Appointment thereof by Iſabel Harvey ſurviving Truſtee of the firſt ninety-nine Years, and Leſſees by the Deed 1653. for ninety-nine Years, and the Lady Jointreſs are Parties.

The Cauſe was formerly heard, and a Decree pronounced by the Lord Chancellor for the Plaintiffs, and now confirmed by him with great Earneſtneſs, and not without ſome Reflection on the Defendant's Counſel, as if the Fee was more regarded than the Juſtice of the Cauſe.

The Points moved were, That the Trust to raise the 6000 l. in Question was appointed to be raised out of an Estate for ninety-nine Years, which falls out to be a void Estate; for it is for the same Term when the former Estate for ninety-nine Years to the Earl of Salisbury did commence, (viz.) after the Death of Nicholas and Isabel, which now in Event of the Cause (Nicholas having no Issue by Isabel) falls out to have the same Beginning and Ending with the former; but two Terms at one Time cannot be in Possession for the same Time; and the Limitation is not that the said Manors shall be to those Uses, but the Trust seems to be restrained to the Estate of ninety-nine Years limited by the Deed, and to those Persons (viz.) Russel, Rich and Lake, who should during the Term to them limited, raise, &c. And where there was no Estate, no Trust could be annexed, nor could there be Trustees of that Estate which had no Being: It were to suppose Accidens subsistere sine substantivo in quo existat, and it were Coloratum sine Colore; and it could not be equitable to make the first ninety-nine Years liable to this 6000 l. for there is no such Thing appointed by the first ninety-nine Years. And the Plaintiff here claims by a voluntary Conveyance without any Agreement or Contract precedent for the doing thereof; but the Defendants claim upon a valuable Consideration of 4000 l. Marriage and Jointure: And 'tis a hard Strain to translate a Trust charged particularly on an Estate of ninety-nine Years, which is a void Estate beyond the Words express to another Estate; for tho' in Truth Nicholas might have charged the first ninety-nine Years after the first 6000 l. charged thereon, yet he did not do it: And the Mention that the Deeds 1651, and 1653. were for a Portion of Money paid, that is untrue, for no more was paid than what was paid and satisfied by the former Settlement 1649.

The Lord Chancellor decreed the contrary, That the Trust of the last 6000 l. should be charged on the first ninety-nine Years. For Nicholas intended the Raising thereof, and had Power to charge the first ninety-nine Years therewith after the other 6000 l. raised, and regarded only the Parties Intent to raise the Money, tho' he pitched not on proper Means.

But

But it was objected, that the Plaintiff's Title being voluntary, and the Defendant's for valuable Considerations, the Plaintiff's Title prima facie is fraudulent against a Purchaser.

The Chancellor said, A voluntary Conveyance may be good and not fraudulent, and that from the Circumstances of Persons of Honour who are Trustees, and concluded it not fraudulent.

And tho' he was prest to direct a Trial at Law on that Point, would not do it; for whether fraudulent or not, is proper for this Court.

The Defendant being a Purchaser had no Notice of the Trust on the last Lease or Estate for Ninety-nine Years, and so not bound by it clearly, she nor her Friends having no actual Notice: And the rather, for that the Deed of 1651. was revoked, and so is recited to be. And there is indeed Mention that an Estate was to be created to Russel, Rich and Lake, and their Heirs, but no Mention that there was any new Estate for Ninety-nine Years to be made to them, nor of the Trust to raise the 6000 l. herein mentioned.

A Recital of the Deed which refers to the Incumbrance, is Notice against a Purchaser. *Vide ant.* 231, 260.

But my Lord Chancellor declared, that there was sufficient Notice in Law, or an implied Notice; for the Mortgage to Hewet was excepted in the Defendant's Conveyance, and therefore they could not be ignorant of the Mortgage, and ought to have seen that, and that would have led them to the other Deeds, in which, pursued from one to another, the whole Case must have been discovered to them.

But against this it was objected, that the Defendant could not inforce the Mortgagee to shew his Assurances, nor would any Mortgagee so do; and when there was only 2000 l. due thereon, which the Jointresses Friends were content to be charged with, there was no Reason to enquire further, especially into Things collateral to the Mortgagee's Estate. Besides, Notice to charge a Purchaser ought to be perfect and compleat, and there was no Means for such Notice; for two Things were to be notified, (viz.) a Power to charge the 6000 l. and Execution of that Power, of which there was no Colour, nor no Means to be informed. For Isabel's Power was general to limit the 6000 l. to any Person or Persons, at any Time by Deed or Will; so the Enquiry was uncertain, and almost impossible to find out.

Mr. Keck preſt it much, that it was without Precedent, that a voluntary Conveyance ſhould be decreed againſt a Purchaſer for valuable Conſideration. Purchaſers were ever favoured by the Court.

My Lord Chancellor was not moved with this Objection.

Philips *againſt* Philips.

A Debtor Executor to the Teſtator, decreed to pay to the Deviſee of the Reſidue, &c. See 1 *Salk.* 306, 308, 309, 299, 300, 303. 1 *Chanc. R.* 138, 242.

NIcholas Philips, the Teſtator, made his Will, and made the Defendant Executor, and deviſed divers Legacies, and the Reſidue of all his perſonal Eſtate to the Plaintiff. The Executor was Debtor to the Teſtator in 400 l. He left ſufficient perſonal Eſtate to pay all his particular Legacies.

The Queſtion was, Whether the 400 l. being diſcharged in Law to the Executor, ſhould be accounted as Part of the Reſidue, there being no Need of it to pay Debts or Legacies particularly given; for the Teſtator muſt not be ſuppoſed ignorant, but knowing of the Law, that by making his Debtor Executor, he thereby diſcharged the Debt, and ſo the 400 l. became no Part of the perſonal Eſtate, and ſo no Reſidue thereof. And Difference was preſſed between Legatees and Debtor, in which the Debt, tho' diſcharged, ſhould be Aſſets, and where it was between the Executor, who is in this Caſe in Effect, a Deviſee of the Debt.

But the Lord Chancellor diſallowed the Difference, and decreed for the Plaintiff the Reſidue, &c. againſt the Executor. Though it was objected that this Caſe was different from former Precedents.

Gartſide *and* Elizabeth *his Wife, and* Anne Ratcliff, *an Infant, Plaintiffs, againſt* Peter Ratcliff *and* others. November 6.

Deeds ſuppreſſed, and the Lands decreed without Trial. *Vide New Caſes in Equity, pag.* 6, 7. *Poſt.* 293. *Ant.* 11, 270. and the Notes *ibid.*

THE Caſe was, Anne the Mother of Eliz. and Peter Ratcliff the Defendant, agreed that a Marriage ſhould be between the Plaintiff Elizabeth and Peter, Son of the Defendant Peter Ratcliff. The Portion 500 l. And

Lands of Peter and the Defendant were to be settled, Part on Peter the Father for Life, Remainder to Margaret his Wife, the Remainder of these Lands, and all other his Lands in Possession, to Peter the younger, and his Heirs, free from his Incumbrances. The Marriage was had, and the Portion paid, and a Deed executed by Peter, purporting a Feoffment to the said Uses. But Peter, the Father, by a Wile and Trick set forth in the Bill and proved, got the same again into his Hands, and burnt or cancelled it.

The Bill is for Relief, that the Plaintiff Elizabeth, the Wife of Peter the younger, may be relieved for the Profits of one Third of the Lands settled in Possession in Fee to her Husband, and the Infant to have the other two Parts of the Inheritance of all according to the Marriage Agreement and Deed in Pursuance thereof. Peter by Answer denied the Settlement, and Henry the Son did so also, and that he had no Notice of the Agreement, and made Title to the Lands by a former Marriage Settlement on the Marriage of Peter the Father, to the Father of Peter for Life, Remainder to the first, second, &c. Sons of Peter, in Tail, to the Heirs Males, &c. so as Peter, who made the Settlement by which the Plaintiffs claim, was but Tenant for Life, Remainder to Peter the Son in Tail, Remainder to Henry the Defendant, second Son of that Marriage, and to Peter the first. And so Peter the first Son being dead without Issue Male, the Land remained to him. But a Recovery was produced by the Plaintiff, suffered by Peter the younger, that he objected against the Recovery, because the Father was Tenant for Life, and survived not.

The Plaintiff had a Decree according to the Bill, and confirmed on Rehearing of the Cause in Hill. 28 Car. 2. by the Lord Chancellor, because the Father suppress and got into his Hands the Writing, which was done for his Advantage, for he needed not have so done for Henry's Advantage; and where Deeds are suppress omnia præsumentur.

And the Chancellor would not allow a Trial at Law, whether the Father surrendred to enable the Recovery or not.

For where Deeds or Writings are suppressed *omnia præsumuntur, &c.* and he who has committed Iniquity shall not have Equity. *Max.* 2. *Ca.* 4, 5. *Vide ant.* 11, 12, 202, 276. *New Cases in Equity* 6, 7. 1 *Vern.* 408. 2 *Vern.* 35, 50, 98, 380, 471, 561, 591, 476.

Sir

Sir Francis Hill *againſt Sir* Robert Carr. November. 6.

SIR Robert Carr covenanted with Sir Francis to ſecure 6000 l. to Sir Francis, in Conſideration of marrying his Siſter. Much Debate was formerly whether it was a Covenant, and ſo obliging to Sir Robert, or no; and Judges aſſiſting, there was a Difference in Opinion in the Point, that it was a Covenant; for where-ever the Intent of the Parties could be collected out of a Deed for the not doing or doing a Thing, a Covenant will lie: And the Chancellor declared his Opinion to be ſo. And a Covenant will lie on a Bond, for it proves an Agreement. And for further Security, a Fine of certain Manors to be levied by Sir Robert; and a Decree was pronounced accordingly. But on Rehearing it was queſtioned whether the Decree ſhould be for the Fine to be levied preſently, or till the Account between Sir Robert and the Plaintiff ſettled; for Sir Francis had received ſome Money. And it was preſſ by the Defendant's Counſel, that until the Account paſt, the Duty was uncertain.

In what Caſes Action of Covenant will lie.
Ant. 161, 211, 260, 247.
Decree for Security of the Money which depended on Account, whether the Security ſhall be given before the Account ſtated.
Vide & N. B. ant. 311.

2dly. That Sir Robert by levying a Fine, Tenant in Tail ſhould ſubject his Eſtate to other Judgments and Statutes. It was anſwered, Security ought to preceed Payment; and if he were ſubject to other Statutes, they were his own Debts: And his Act ought not to prejudice Sir Francis, who was intitled to have a Fine by Sir Robert his own Covenant; and there was no Reaſon the Court ſhould hazard the Plaintiff's Debt, leſt Sir Robert ſhould be made ſubject to other Debts.

2 *Rol. Rep.* 434.
2 *Vent.* 350.
1 *Levins* 239.
Hob. 203.
1 *Rol. Abr.* 379. *Pl.* 7.
Ant. 171, 172, 235, 236.

But the Lord Chancellor declared, as he after decreed for the Reaſons, ut ſupra, that the Fine ſhould be reſpited till the Account ſettled.

It was objected, that Sir Robert being Tenant in Tail; if he ſhould die before the Account ſettled, the Iſſue in Tail will not be bound by the Decree.

Covenant to levy a Fine, and a Decree that he ſhall ſo do, binds the Iſſue in Tail.

But the Lord Chancellor anſwered, that the Covenant being to levy a Fine upon valuable Conſideration, and a Decree in Purſuance thereof, the Decree will bind the Iſſue, ſeeing the Father of Sir Robert had Power by Fine to bar the Iſſue.

And another Matter was, the Defendant was left to his Remedy at Law on the Land by way of Covenant, to recover such Damages only as he had sustained by not settling the Jointure on his Wife, tho' he was now dead.

And we objected that this Bond was for the Wife's Advantage, in Trust for her.

The Lord Kennoule *against the Earl of* Bedford, *and others, Trustees of* James *Earl of* Carlisle, *whose Heir at Law the Plaintiff was.* December 19.

THE Case was, The Earl by his last Will devised his Debts to be paid by his Lands in D. and if those sufficed not, by Sale of his Lands in S. and if those sufficed not, by Sale of his Park; and if that sufficed not, by Sale of his Lands in Waltham, and devised that the Plaintiff should have 600 l. per Ann. during his Life out of his Lands in Waltham. The Trustees sold D. and S. and a great Part of his Lands in Waltham, and paid the Debts; but the Park was not sold; but the Lands in Waltham not sold are not sufficient to answer the Annuity which was 4000 l. arrear. It was prayed that since Waltham Lands were sold instead of his Park, that the Park might be sold to satisfy the Arrears, which was ordered accordingly, and the Money to be so applied. But there arose some Impediment in the Sale, by reason of some Title pretended to the Park by some who were no Parties to the Bill; and thereupon however the Possession of the Park was decreed to the Plaintiff against the Trustees, and all the Profits of Waltham Lands unsold.

2 *Vent.* 363. *ant* 7 and 8. See *Max. in Eq. pag.* 10, 11. 1 *Vern.* 219. Lands out of which an Annuity is issuing, sold for Payment of Debts; it was decreed to be paid out of other Lands unsold.

Note; the Reason of this Decree seems to be founded on the Maxim, Equality is Equity, *i. e.* both the Heir and Annuitant are set on an equal Foot. *Max. pag.* 10.

Freeman *against* Goodham. December 19.

THE Wife when Sole, bought Goods for Money, and after married, and died. The Goods came to the Husband's Hands after her Death, but the Debt remained unpaid.

The Husband charged with Debts of the Wife for Goods of the Wife; *ant.* 81, 121.

The Bill by the Plaintiff, the Creditor, was to discover the Goods, and a Demurrer thereto, which was overruled by the Lord Chancellor, who with some Earnestness said he would change the Law in that Point.

DE

DE
Term. Sanct. Hill.
Anno Regis 28 & 29 Car. II.
IN
CANCELLARIA.

Pain *againſt* ..... January 18.

The Husband pleads: His Wife will not ſwear to it. See 1 *Chanc. R.* 68. 2 *Chanc. Ca.* 39, 173. *Curſ. Can.* 116, 187. 207, 211, 460, 470, *&c.*

A Bill by the Plaintiff againſt the Husband and Wife, Daughter of the Plaintiff. The Husband put in a Plea in the Name of him and his Wife, and ſwears to the Plea; but the Wife would not be ſworn. The Husband moved that the Plea might be accepted, ſuggeſting that the Wife did it by Combination with her Mother.

Ordered that the Plea ſtands as for the Husband, and the Plaintiff to proceed againſt the Wife.

Ford *Lord* Grey *againſt the Lady* Grey *and others.*
Et econtra.

The Father purchaſeth in the Name of a Son unadvanced, it is an Advancement, not a Truſt.
Vide 2 *Chan. R.* 288, 289.
1 *Vern.* 467, 109, 366.
Ant. 296.

William Lord Grey had Iſſue Thomas his eldeſt Son and Ralph his ſecond Son: William the Father for 13000 l. purchaſed the Manor of Gosfield in the Name of Thomas and his Heirs, and he enjoyed it, and took the Rents, and bought other Lands adjoining in his own Name, and added them to the Park, and incloſed them therewith, and owned all as his own ſometimes; and Thomas declared ſeveral Times, that the Manor was his Father's, not his, or to that Effect. But on the other ſide divers Speeches of his Father's were proved, that it was his Son's, and the Son by his Will gave the Manor to his Father for Life; and divers Speeches alſo by the Son and Father that the Manor was Thomas his Manor, and the Father proved the ſaid Will, being Executor.

The Question was, Whether the Purchase was a Trust in Thomas for the Father, or an Advancement by the Father to the Son. And decreed an Advancement, not a Trust. And whereas the Father did after the Death of Thomas convey Gosfield and three other Manors in Trust to raise 2000 l. for two other of his Grandchildren, Ralph and Charles, Gosfield was not liable thereto.

Another Question was: Ralph Father of Ralph and Charles, and of Ford, did make a Conveyance of Gosfield to Trustees and their Heirs, to pay his Debts and Legacies; and after for Performance of his Will, and at the same Time made his Will, and thereby did devise the Trustees to pay 2000 l. apiece to Ralph and Charles, and also 6000 l. to Katharine his Daughter, the Surplus after to his Heir Ford, and made his Wife one of the Defendants Executrix, but gave her not thereby in Terms the personal Estate, but only made her Executrix; and devised that his said three Children should release to his Executrix all such Actions and Demands of his personal Estate to his Executrix. Now the Question was, whether the Executrix should be liable to the Legacies of the Children in Aid of the Heir, who had the Surplus of Gosfield that was to be sold?

Personal Estate in Aid of the Heirs.
Vide ant. 7, 255, 262.
1 *Chan. R.* 164, 156.
2 *Chanc.* 296.

As to the Creditors it was agreed she must be liable; but as to the Childrens Legacies there ought to be no Aid for the Heir; for when the Legatees were by the Will to release all Demands out of, or to the personal Estate, they could make no Demand out of it, which shews his Intent, that therefore as to the Interest and Legacies the personal Estate was to be discharged, and the Executrix to enjoy the Estate free against them, and therefore the Heir not to charge the Executrix as for those Legacies of which he discharged his Executrix, especially having otherwise provided for their Satisfaction. And the Surplus to the Heir is expressly after Debts and Legacies paid; therefore not before.

Lands devised for Payment of Debts and Legacies, the personal Estate shall be first applied.
Ant. 32, 177, 179, 180, 197, 280.
New Eq. Ca. 170, 171.
1 *Vern.* 482.

Against which it was said, that regularly the personal Estate must aid the Heir, and an implied Intent must not without clear Expression alter the equitable general Law.

And there were other Reasons for the Release to be given (viz.) The Estate was in the Province of York, liable to the Children for Portions.

The Lord Chancellor decreed the personal Estate to be accounted for in Aid of the Heir in order to aid him for what he should be charged withal, not only as to the Creditors, but as to the Legacies charged on Gosfield (viz.) the 6000 l. to the younger Children.

DE
Term. Sanct. Trin.
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Boynton *againſt Sir* Robert Sprignal. July 3.

The Truſt of a Term void by Acceptance of a Fee, the Fee being defeated, the Term decreed to *Ceſtuy que Truſt*.
Vide ant. 49, 191, 287.
1 *Vern.* 60.

A Term conveyed on Truſt to be void on purchaſing and ſettling on Sir R. Sprignal for Life, and after to his Wife for Live, with Remainder over of an indefeazible Title, &c. and this Truſt was declared by Deed indented. After the Husband accepts of Lands in Buddington, Part of the Lands of the Lord Craven, and deſires the ſame in lieu and Satisfaction of what was to be done.

The Lord Craven on Reſtauration of the King enters.

The Lord Chancellor decrees the Truſtees to ſurrender the Leaſe to the Purchaſer of the Lands which were aliened by Sir Robert Sprignal.

Note; a Truſt by Deed interpreted to be ſatisfied by the Lands of a bad Title, though the Deed of Truſt be of an indefeazible Title, on Proof of Diſcourſe, and mention that the Meaning was to ſettle Delinquents Lands; and the Feme Covert bound by Agreement of the Husband.

Needler *against* Deeble. July 12.

MOrtgagee sued the Mortgagor to pay, or be foreclosed of Redemption. An Account was directed and settled before a Master; and now a subsequent Mortgagee, whose Mortgage was made before the former Bill was exhibited, sued the first Mortgagee and Mortgagor to have a new Account, supposing the former Account to be false, and made by Consent and Fraud; but did not insist on any Particulars, as in such Case he ought.

The second Mortgagee bound by the Account between the first Mortgagee and Mortgagor.

The Lord Chancellor declared that the Account should bind the second Mortgagee without farther Examination, if the Fraud and Collusion were answered; for the first Mortgagee did all he could, and is not bound to seek after the second Mortgagee; for then it should be in the Power of the Mortgagor to make the Assurance uncertain and endless to the Mortgagee. It shall suffice to deny the Fraud and Collusion.

No travelling into an Account stated, but by charging of Particulars. *Vide ant.* 55, 127, 128, 173, 262, &c.

DE
Term. S. Mich.
Anno Regis 29 Car. II.
IN
CANCELLARIA.

Ayloff *againſt* Fanſhaw. October 15.

Money brought into Court imbezilled.
Curſ. Canc. 427.

THE Remembrancer of the Exchequer takes Money brought into his Office by Order of Court, and ſpends it, and dieth; the ſucceeding Officer (fearing to be charged with the Money, (viz.) that his Office would be ſequeſtred, (viz.) till the Money made good by the Profits thereof) ſues the Party who ought to pay the Debt, (viz.) the Defendant Fanſhaw, who was bound with the Lord Fanſhaw to the Lady Kent, upon Account of which Debt the Money was brought into Court, and which Defendant was Executrix, &c. to the Party, the late Remembrancer, who miſemployed the Money. And a Demurrer to this Bill was diſallowed; and 'twas held the Plaintiff might well proceed in Chancery.

Demurrer to the Juriſdiction.
See *Curſ. Canc.* 211.

Barns *againſt* Canning *and* Piggot.

Aſſignment of a Decree is only a collateral or ſupplemental Security.

A Bill was exhibited to redeem a Mortgage againſt Canning. Pendente lite Canning conveyeth his Lands in Queſtion to Piggot for Money. The Cauſe being brought to Hearing, and a Decree for Canning, and enrolled; Canning being to borrow Money of Barns, gave him a Conveyance of Lands, and aſſigned the Benefit of that Decree, which were both, (viz.) the Conveyance of the Lands and the Aſſignment of the Decree, defeazanced for

Payment of the Money borrowed by Canning of Barns. Barns parted with the Money, till that as well the Assignment of the Decree as the Assignment of the Lands were made, the Lands without the Benefit of the Decree being not of Value sufficient for the Security. Barns offered in Court to resign to Piggot and Canning both Land and Decree, on Payment of Debt and Damage, and insisted that Piggot coming in pendente lite, could not, in Canning's Name nor his own, sue a Bill of Review. Barn's Suit was to set aside a Release of the Decree, which Canning had made for no Consideration.

The Chancellor disliked the Purchasing of Decrees, and said he was mad that would do it: Yet if the Plaintiff had it, he would not avoid it, but made the Question to be, Whether that the Assignment of a Decree was not a collateral and supplementary Security, and not an original Security; and so took it to be, and dismist the Plaintiff. He is mad that will purchase Decrees.

Sir Robert Austin's Case, who purchased and paid the same Day that the Bill was exhibited by Culpeper; yet lost his Purchase, having no Notice of his Suit. *Vide* 2 *Vern.* 37, 88, 89, 663.

Pit *against* Pidgeon. November 26.

Et econtra.

A. Deviseth that 300 l. be paid to his Child which he shall have at the Time of his Death; and if he have none, then to his Sister. Afterwards three Children are born to him; then by a Codicil he deviseth 200 l. to each of these Children, to be paid at their respective Ages of twenty-one Years. Devise of 300 *l.* to the Child he shall have at his Death. After he has three Children, then makes a Codicil, and gives each 200 *l.* a-piece.

The Lord Chancellor decreed, tho' the 300 l. be devised to the Child, &c. and now there be three, the Devise is not void for Uncertainty, but all three Children share in it; and that the Devise of 200 l. being without Words signifying the same to be of their Portions, nor any Thing one way or another to revoke or affirm the former Gift of 300 l. it shall be taken by Way of Accumulation, and the Children shall have both Legacies. Legacy and Accumulation.

Legacies how payable, and of Accumulation of Legacies, *vide* 3 *Chan. Rep.* 54, 65. 2 *Chan. Rep.* 101, 112, 188, 363. 1 *Chan. Rep.* 145, 188, 269.

Butcher

Butcher *against* Hinton *and* Short. Dec. 5.

Short was not brought to Hearing.

A voluntary Agreement not binding in Equity, unless all be performed.
Vide 1 *Vern.* 34, 121, 210, 348, 217, 229, 456.
2 *Vern.* 127, 415. 693.

THE Case. Butcher and Short, Partners in Trade, were indebted to Hinton a Banker, in a Bond of 12000 l. for Payment of 6000 l. in October 1675. That Money being due, Hinton in December 1675. was called upon by his Creditors importunately for great Sums of Money. He requires Butcher and Short to pay him; whereupon they and Hinton agree, that for 2000 l. they will become jointly bound for so much to Hinton's Creditors, and for 4000 l. Residue, each to be severally bound to Hinton's Creditors, (viz.) each for 2000 l. and not jointly; and Hinton gave a Receipt for 6000 l. under Hand and Seal to them; and agreed to deliver up the Bond of 12000 l. And being asked for it, excused the present Delivery of it, because of the present Hurry of Business, but would do it. The Bonds to the Creditors were accordingly entred into. The Agreement prout proved by three Witnesses. The Bill was to have up the Bond of 12000 l. for Hinton, in Favour to Short, endeavoured to charge Butcher.

Hinton in his Answer confest the Agreement, but that it was qualified, and Part of the Agreement was, that Hinton should be counter-secured by their Bonds against the Creditors to whom he was bound, and that he was damnified for Want of such Counter-security; for that he had been sued and forced to pay the Creditors 3000 l. and produced the Bonds whereon he paid the Money cancelled; but he had no Witness that proved expresly that Part of the Agreement touching Counter-security; but proved four Bonds of Counter-security sealed, &c. and left with the Scrivener; but not to be delivered till Matters agreed by Hinton and Butcher.

The Lord Chancellor. I take it for granted, that what Butcher did he agreed to do; or else he would not have done it.

The Counsel for the Defendant insisted, that the Agreement being voluntary, unless all that should have been performed were performed, the Defendant should not be bound thereby in Equity, and his good Security taken from him.

Churchil. The Plaintiff fails, in not paying, nor giving Counter-security. Econtra

Econtra, It was said, that the Agreement was to give Bond not to pay the Money; for the Bond once given binds to Payment, and the Failer of Short to give Security may not prejudice Butcher, who did: And the Caution to the Scrivener must be intended of the relate to, not the delivering up the 12000 l. Bond; for 'tis no Reason to countersecure and become doubly bound for the same Debt, but ought first to be discharged of the old Bond and Debt.

The Lord Chancellor. This Debate assures me that Short has failed, or else the Contention is vain; and the Agreement not being fully performed, I cannot take away Hinton's legal Security, and pay him with Parchment; and Hinton had little avail by the Agreement, being bound in the new Bond. 2 *Vern.* 117.

Vanacre's *Case*. December 20.

A. Was indebted to B. Vanacre in 7000 l. and to C. and others in 360 l. and became Bankrupt. B. sued at Law, and had Judgment, and by Fieri fac. 23000 l. by Goods, but knew nothing of the Bankrupcy. C. sued out a Commission of Bankrupcy, and had those Goods that were taken in Execution assigned, and for some of them brings an Action of Trover against B. and hath Judgment and Execution for 50 l. or thereabouts. B. dieth, and the Assignee of the Commissioners brought an Action of Trover against the Executor for the rest of the Goods, and recovers 500 l. and hath it, and then brought a Bill in Chancery for the rest of the Goods against the Executor, as in Case of an Executor, who commits a Devastavit, and dieth, his Executor shall be charged here, tho' he cannot be charged at Common Law.

Creditors to come to an Account, and to have proportionable Satisfaction out of the Estate not recovered. See 1 *Vern.* 34, 297, 70, 101, 404, 440.

On the first hearing an Order was drawn up, that the Petitioner and other Creditors should come to an Account and proportionably have Satisfaction out of the Estate not recovered. Whereupon the Case came now to be re-heard and so ordered.

The Lord Chancellor. The Order is not well grounded. This is not like the Case of a Devastavit, wherein in Time the Common Law will be altered. I should not in this Case have decreed the Executors to account, but grounded my self on a Consent, and that was, that the whole Debts and whole Estate be on all hands accounted for, comprehending the Money recovered, and proportionably divided.

Then Costs was prayed to be, for that the Executors should pay Contribution Money; but decreed otherwise.

Note;

1 *Roll. Abr.* 376. *R. pl.* 3. *Moor* 556. *pl.* 755. *Con.*

Note; The Executor in Case of a Devastavit is in Nature of a Trustee of an Estate. The Testator here is a Trespasser, to which the Executor is no way liable.

Willoughby *against* Perne. December 21.

THE Bill was to be relieved against a Statute of 26 Eliz. 94 Years old, by the Heir, against a Lease of 60 Years made by the Ancestor, for A. in Trust for 40*l.* a Year, to a Wife for a Jointure, the Heir claiming by another Statute sign to the Lease in Trust, so as the Lease could not hurt him.

The Wife, to protect her self against the Statute pendente lite, after the Bill exhibited, procured an Assignment of the first Statute, and set it forth by Answer. Against which Proof was made by the Plaintiff, that the Defendant, (viz.) the present Husband, who married her when a Widow, had after the Bill forged and falsified the Church Book, whereby it would appear that the Statute was not acknowledged by the Befail, as the Defendant pretended, and who after the Statute purchased the Land, but by the Befail of the same Name. And that William the Befail was an Infant, (viz) of sixteen Years, and so it was to be presumed, that after so long Time, that his Father, and not he was Cognizor, and then the Land not being ever in the Befail, his Statute could never affect the Land; and the Equity of the Plaintiff was on the Antiquity of the Statute, because of the Falsity of the Defendant.

Antiquity of a Statute answered by being proved, and Interest paid. *Vide ant.* 270. 1 *Vern.* 49 to 52, 294, 398, *&c.*

The Plaintiff's Evidence of his Defence at Law is suppressed, and the Defendant having sworn in his Answer he knew not of the Statute of 26 Eliz. 'till such Time, that was also proved false. The Defendant proved the Lease and Jointure, and Payment of Interest 'till 1644. and then Agreement to forbear Extent 'till 1658. and then a Minority.

The Lord Chancellor. This Statute being proved, and Interest paid, the Antiquity is answered, and a Man shall not be arraigned out of his Estate; and it is not material what was given or paid; for if he paid nothing the Heir shall not profit himself by it. But a Proposal being made by the Defendant, Time was given to the Plaintiff to accept it, or be dismist.

DE
Term. Sanct. Hill.
Anno Regis 29 & 30 Car. II.
IN
CANCELLARIA.

Stock *againſt* Denew.

THE Defendant libelled in the Admiralty Court of Dover againſt the Ship called the, &c. and ſuggeſted himſelf Owner, and that the Ship was unlawfully taken from him at Sea; and the Ship coming into Dover Road and arreſted, one Parlivan came & pro intereſſe ſuo pleaded to the Proceſs of the Admiralty; That during the War between England and Holland, a Dutchman (naming him) by Virtue of a Commiſſion from the States, took the Ship and ſold it to him, and thereupon the Plaintiffs Stock and his Surety did give a Bond to pay the Condemnation Money. On final Judgment of that Court the Ship was there appraiſed, and Sentence for the Plaintiff, becauſe the Defendant failed in Proof; and the Defendant appealed to the Duke of York (Chief Admiral of Dover) and a Commiſſion by the Duke to hear and ſentence, &c. and therein the Appellant proved the Commiſſion to the Dutchman and Captain, and had Sentence for her. But the Bond being put in Suit at the Common Law, the Defendant pleaded the Sentence in the Appeal. But the Queſtion there was, Whether the Appeal was well brought, becauſe it was not ſufficiently ſet forth that the Duke had Jurisdiction of the Judges in Camera Scaccarii

No Appeal from the Court of *Dover* to the Lord High Admiral.
Vide ant. 123, 124, 173, 201.
New Eq. Ca. 95.

(for there it was depending by Writ of Error) directed Search to be made for Precedents of Appeal to the Duke as Admiral, but none could be found. The Defendant exhibited his Bill in Chancery, and finds there no Relief, for he desired there to examine his Witnesses, and to have a Commission for that End. But in regard the Appeal was not brought in Time, prevailed not.

Of Appeals to Chancery. *Vide* 1 *Vern.* 177, 184, 234, 442, 443. 2 *Vern.* 118, 464, 491. *Curs. Canc.* 403, &c.

The Plaintiff petitioned the King on the whole Matter, and prayed a Commission of Review of the Dover Sentence; and the Dutch Agent or Ambassador interposed therein; and it being Business of State, and relating to Articles made on the Peace, an Order was made by the King and Council, that the Parties should go to Trial, and the Property be insisted on (viz.) in Effect, whether the Ship was lawful Prize or no, in an Action of Trover. Stock thereupon moved in Chancery to stay Proceedings on the Judgment at Law 'till the Trial; which was granted, it being a Matter of State, and of which the King and Council had taken Notice. But Stock desired the Depositions of Witnesses taken in Chancery and Dover Court, and that the Commission from the Duke might be used at the Trial. By Order of Chancery those of Dover and in Chancery were yielded to; but Opposition was made to the Depositions by the Dover Commission, because they were coram non Judice.

Matters of State. *Ant.* 123, 124, 173,

The Lord Chancellor denied the Use of them for that Reason. But the Plaintiff shall not therefore lose his Cause if he can yet make Proof, tho' he mistook his Way; and the Case concerns Matter of State, and therefore he shall have a Commission to prove his Cause if he can. But the Plaintiff shall bring the Money into Court.

Condition of a Bond to pay the final Condemnation of the Court of *Dover* how relieved.

Note; It is admitted at Law and in Chancery, That tho' the Condition of the Bond was to pay the final Condemnation of the Court of Dover, yet if the Appeal had been right, and the Sentence at Dover repealed, the Plaintiff should be eased of the Bond. The Injunction was continued 'till the Trial.

And note, Equity will relieve against Breaches of Conditions, wherever Compensation can be made. *Vide* 1 *Vern.* 83, 167, 223, 270, 271. except in Cases of voluntary Settlements, &c. *ibid.* 456.

DE
Termino Paſchæ,
Anno Regis 30 Car. II.
IN
CANCELLARIA.

Anonymus. April 18.

Bankrupts, &c. *Ant.* 19, 71, 232, 275, &c. Admiſſion to a Contribution after four Months. See 1 *Vern.* 208, 267, 8. 2 *Vern.* 71, 602, 157, 662, 706.

A Commiſſion of Bankrupcy was taken out againſt Thomas Forth, the 17th of Nov. 1676. but proſecuted only by Mrs. Ruſhworth; the other Creditors conſenting that Execution of the Commiſſion be forborn a Month; but Ruſhworth did not conſent, nor knew thereof, but herſelf proſecuted, and ſhe ſued Mead, who had poſſeſs'd the Eſtate by Aſſignment of the Bankrupt. And it was inſiſted at the Trial, that Forth, who was the Bankrupt, was not ſo; and after ſhe had a Verdict, and the four Months were out; three Weeks after ſhe petitions to be admitted into the Diſtribution, and now would contribute to the Charges; the Suſpenſion of executing the Commiſſion having been ſo order'd by the Chancellor; and now directed to be admitted into Contribution by my Lord Chancellor.

The Lady Turner *againſt* Bromfield.

A Truſt of a Term for the Wife not diſpoſable by the Husband. *Vide ant.* 58, 194, 225, 266, &c. *ibid.*

THE Plaintiff being to marry Aſton, it was agreed between Sir Will. Aſton and Mr. Ewer, the Plaintiff's Father, that 2000l. Portion ſhall be paid, and 300l. per Ann. ſettled for the Lady's Jointure. And the Lands in Queſtion, in order thereunto, were leaſed to Stephen Ewer and Nicolas Ewer, for 99 Years, if the Plaintiff lived ſo long; and Stephen and Nicolas redemiſed the Lands to

Aſton for a leſſer Term, rendring 300l. Rent per Ann. The Portion was paid on the Marriage, and the Inheritance ſettled on the Husband; the Husband died, the Plaintiff married Sir Edward Turner, and he for valuable Conſideration ſold all his Eſtate at Law and Equity, which he had in his own or his Wife's Right, and thoſe under whom the Defendants claim, and made a Jointure of other Lands of 200l. to the Plaintiff, who exhibited her Bill for the 300l. per Annum, and ſhe is Executrix to Nicholas Ewer ſurviving Truſtee. The Queſtion was, Whether the Sale by Sir Edward Turner, her ſecond Husband, ſhould bar having the Jointure; for there was no Agreement for that to bar her firſt.

But it was inſiſted on, That though the firſt Husband might not alien, the ſecond might; for it was no more than if a Wife were Ceſtui que Truſt of a Term, the Husband might ſell, which was ſaid, he might; for though a Thing in Action was not vendible at Common Law, yet is every Day otherwiſe in Equity.

The Husband cannot ſell the Wife's Jointure by a former Husband.
Vide ant. 194, 225, *&c.*
Curſ. Canc. 470.
1 *Vern.* 7, 18, 161, 408.

The Lord Chancellor agreed, If a Husband make a Leaſe for Years in Truſt for the Wife voluntary, and he ſells, this may bind the Wife, becauſe of the Fraud. But where a Truſt is created for a Wife, and here in this Caſe bona fide, the Husband can in no wiſe bind the Wife, unleſs where ſhe is examined, as in a Fine, or in this Court, elſe no Man ſhall be able to provide for Wife or Children. And he hath no Regard or Notice, or not, to the Purchaſer, tho' in this Cauſe, nor to the ſecond Jointure. And decreed for the Plaintiff; and a former Precedent in Point was ſhewn.

Becauſe then there ſhould be a Perpetuity of a Term; and though there be Difference in Words when Lands of Freehold are deviſed to one for Life, the Remainder afterwards to his Heirs immediately; and when a Term is ſo deviſed, the Difference is in Words; and new Eſtates, Jointures and Settlements, are of long Terms: And a Similitude is between them, &c.

DE
Term. Sanct. Hill.

Anno Regis 30 & 31 Car. II.

IN
CANCELLARIA.

Civil *againſt* Rich. January 24 & 25.

THE Queſtion was on a Will, whereby after other Bequeſts this Clauſe was added, (viz.) *Item* All the reſt of my Lands, Goods and perſonal Eſtate I give to *A. B.* on Truſt, to give my Children and Grandchildren according to their Demerits. The Teſtator died: The Deviſee, who was heir and Executor, gives the Land to one omitting the reſt. And the Queſtion was, If that was a Diſpoſition according to the Truſt, and was much argued.

All the reſt of my Eſtate I give to *A. B.* to give to my Children and Grandchildren, according to their Demerits.
Vide Max. Eq. 17, 66, 257, 340.
2 *Chan. R.* 144, 146.
1 *Vern.* 415, 355, 414.
Ant. 196, 262.

The Lord Chancellor. I take it for a Rule, that wherefoever there is a Demand in Law or Equity, there muſt be a Certainty of the Thing demanded to be adjudged or decreed; here it is left both for the Time when the Demand ſhall be made, and to the Sum or Proportion of the Lands; and here is by that Means an Uncertainty of the Parties, to whom he may afterwards have more or leſs Grandchildren. I ſit not here to make the Wills of Men, nor to interpret them farther than the Wills go; and therefore as to the Settlement of the Lands on one and not all, I cannot alter: It is clear the Children are not to come in by the Will immediately, but by the Act of the Deviſee; and he is to give or diſtribute according to their Demerits; therefore he is Judge; and diſmiſs the Bill as to that.

Whereſoever there is a Demand, there muſt be a Certainty of the Thing demanded.

The

Deviſes to his Wife to diſtribute among his Children during her Widowhood; ſhe marries, and then diſtributes, not good.
1 *Vern.* 355, 414, 415.
2 *Vern.* 421, 513,

He remembred ſeveral Caſes in this Court, (viz.) one adjudged by himſelf, where the Husband of a ſecond Wife having two Daughters by the firſt, deviſed his perſonal Eſtate to his Wife, to be diſtributed among the Daughters, during the Widowhood of his Wife, and died; ſhe married again, and afterwards gave the Whole to one of them; in that Caſe the other was relieved, becauſe the Power of diſtributing, during her Widowhood, did determine upon her ſecond Marriage; and a Truſt may be annexed to a Power, or to an Eſtate with Power.

Deviſes to his Wife, in hope ſhe will leave it to his Son, no Truſt.
See 1 *Vern.* 66, 257, 415.
2 *Vern.* 559.

He alſo remembred a Caſe between ..... and ..... in the Lord Egerton's Time, where one poſſeſſed of Leaſes for Years deviſed them to his Wife, and hoped ſhe would leave them his Son, and died. Her ſecond Husband granted the Leaſes away; the Son ſued to be relieved, but was diſmiſt; for it was no Truſt for the Son.

And in the principal Caſe, he ſaid, tho' they amounted not to give the Plaintiff the Lands, yet the Words were not idle, but put a Reſtraint on the Deviſee; for tho' he might give the Lands as he did, yet he could not give them in Poſſeſſion or Remainder to any Stranger, but only to the Family.

Then another Queſtion aroſe touching the perſonal Eſtate, wherein the Point was, That a Citizen of London, being reſiduary Legatee, dying, whether this being but a Legacy; which till Election reſted prima facie in the Legatee, not as Legatee, but as Executor, (for he was Executor) and the firſt Teſtator's Eſtate, which remains in the Executor as Executor, ſhall not be ſubject to the Cuſtom, as the Executor's own Eſtate.

Whether the Eſtate which a Citizen hath as Executor to another, be liable to the Cuſtom.
Vide 1 *Vern.* 104, 345.
2 *Vern.* 98, 665.

The Lord Chancellor decreed the contrary, and ſaid, I will make Election for him.

Clark *againſt* Danvers. January 28.

Copyhold for Lives; Cuſtom that the firſt Taker may bar thoſe in Remainder.

Samuel Wats, Grandfather of the Plaintiff, took a Copyhold Eſtate in Reverſion for three Lives: And the Copy was to Elizabeth, Mother of the Plaintiff, and to J. S. and Danvers ſucceſſively. Eliz. was made the Purchaſer, (viz.) Et Eliz. dat pro fine 4 l. By the Cuſtom of the Manor, the firſt Taker may bar the Remainder. Danvers, the Defendant, was Godſon to the ſaid Samuel, Elizabeth the firſt Taker, and J. S. died. Danvers is admitted; the

Copyhold was decreed to the Plaintiff, Heir and Executor to Elizabeth; for my Lord Chancellor held, that though Samuel paid the Fine, yet when by his Consent Elizabeth was made Purchaser in the Copy, it shall be taken as all one as if she had paid it. And if so, it shall be intended that all the Estates in Remainder were in Trust for her, and she hath Power, as by the Custom, so by the Trust, as Cestuy que Trust, to dispose of them.

Trust of a Freehold for Life decreed to the Heir.

Sir Francis Winnington objected, That however the Plaintiff was not intitled; for as Heir or Executor she cannot be intitled to the Trust of a Freehold for Life.

The Lord Chancellor. Who shall have it, &c.

Gold *against* Canham. January 28.

Gold, Lee and Canham were Partners in a Trade at Leghorn; upon Account they dissolve their Partnership, and Gold had his Share satisfied him out of the Stock. Many Years afterwards Gold had Occasion to receive 500 Dollars at Leghorn, which was to be paid him for Merchandize by A. B. another Stranger, which no way related to the Partners Trade. The 500 Dollars were consigned by Bill drawn on Kirk by Canham payable to Gold, to be received for his Use, and Gold received them. Canham sued at Law for the Dollars. Gold sues here to be relieved, and insists that he ought to detain the same, because when the Partnership was dissolved, Canham did covenant to save him harmless from all Losses and Damages due, or which might be due, or brought on, or which might or should happen to him the said Gold in relation to his Part; and that long after the Dissolution of the Partnership he was sued by the Duke of Tuscany for Customs unpaid at Leghorn, for the Goods which belonged to the Joint Trade, which amounted to 60 l. and Costs, which he had paid, and therefore insisted to retain to pay himself out of the Dollars.

Partnership in Trade determined; yet one retains Money in his Hands for Satisfaction of a Contract to save harmless.

Mr. Attorney Jones. The Partnership was long surrendred (I think he said fourteen Years) in all which Time we have nothing to do with Gold, and the 500 Dollars is paid only to our Use, and no relation to the Partnership. And the Covenant to save harmless is no Debt, but only rests in Damages. And to the Sentence in Law we are no Party, nor ever acquainted with it. And by what Evidence or

faint

faint Defence made by Gold the Sentence was given, we know not. And it is more probable when Gold had his Money in our Hands he, on Design to pay himself out of our Money in his Hands, made faint or no Defence. And it is improbable that the Duke's Officers should be so long negligent of the Dues to the Duke; and the Plaintiff should have given notice to the Defendant.

The Lord Chancellor. Whether the Bill of Exchange was before or after the Sentence, doth not appear.

Mr. Attorney objected. This is like a foreign Attachment to pay due on one Account, or Occasion, out of another; and the Money is not due from Canham only, but also from Lee, 'till at last it was answered, that Canham's Covenant extends to all which Gold's Part suffered.

And decreed accordingly.

Of Partnerships in Trade, and where the Stock and Charge survives, or not, *vide* 1 *Vern.* 118, 217, 297, 298. 2 *Vern.* 293, 643, 706.

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